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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

K.R., An Infant, By Her Parents and Next Friends, M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether IDEA, and its accompanying regulations, requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, an instructional assistant on site at a private parochial school where K.R.'s parents have voluntarily chosen to enroll her.

II. Whether the Anderson Community School Corporation's conduct, of refusing to provide the necessary instructional assistant to K.R. at the private parochial school, violates the neutrality principle of the clauses of the First Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners K.R., an infant, by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R., and the respondent, Anderson Community School Corporation.

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In The

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K.R., an infant, by her parents and next friends M.R. and K.R.R.,

and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case upon the remand from this court of June 27, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is dated September 10, 1997 and is reported at 125 F. 3d 1017 23 IDELR 1137 (7th Circuit 1997) and is reprinted at Pages A-1 through A-4 of the appendix to this petition. The order of the Supreme Court of the United States remanding for consideration of the IDEA amendments of 1997. Pl. 105-17, 111 Stat. 37, is dated June 27, 1997, and is reported at 117 S.Ct. 3d 2502, 138 L.Ed.2d 1007, and is reprinted at page A-5 of the appendix to this petition.

The opinion of the United States Court of Appeals for the Seventh Circuit is dated April 12, 1996 and is reported at 81 F.3d 673, 23 IDELR 1137 (7th Circuit 1996) and is reprinted at pages A-6 through A-18 of the appendix to this petition. The Seventh Circuit's Order Denying Petition for Rehearing With Suggestion for Rehearing En Banc, dated May 28th, 1996, is unreported and is reprinted at pages A-19 through A-20 of the appendix to this petition. The Memorandum Opinion entered by the United States District Court for the Southern District of Indiana is reported at 887 F. Supp. 1217, 22 IDELR 724 (S.D. Indiana 1995) and is reprinted at pages A-21 through A-46 of the appendix to this petition. The Findings of Fact, Conclusions of Law and Decision of the administrative hearing officer is dated December 2, 1993, and is unreported. It is reprinted at pages A-48 through A-56 of the appendix to this petition. The appeal of the hearing officer's decision was heard by the Indiana Board of Special Education Appeals and their decision was rendered on April 7, 1994. The Board's decision was unreported, and is reprinted on pages A-57 through A-62 of the appendix to this petition.

STATEMENT OF THE GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit is dated September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.§254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment I

Federal Statutes

20 USC §§ 1400 et seq, Individuals with Disabilities Education Act

PL 105-17, 111 Stat. 37 Individuals with Disabilities Education Act Amendments of 1997

Code of Federal Regulations

Education Division General Administrative Regulations ("EDGAR") 34 CFR §§ 76.650-659

Code of Federal Regulations

IDEA Regulations, 34 CFR §§ 300-403, 450-452, 552

Indiana Statute

Indiana Code §20-1-6-4

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

Part B of the Individuals with Disabilities Act (IDEA) 20 U.S.C. §1400 et seq., provides for federal grants to be made through states to local school districts to assist in

providing educational services to children with disabilities. Each state which elects to participate in this program must, and Indiana has agreed to, accept the provisions of the Act. 20 U.S.C. §1412; I.C. 20-1-6-4. 1997 Amend. P.L.105-17, 111 Stat. 60, §612

1. **Individual Entitlement to Benefits Under IDEA**

When a state accepts an IDEA Part B grant, it must ensure that a "free appropriate public education" ("FAPE"), which includes special education and related services, is made available by the state or a local school district to meet the identified needs of each disabled child. 20 U.S.C. §1412(2); 34 C.F.R. §300.121. 1997 Amend. P.L. 105-17, 111 Stat. 60, §612(1)(A). Therefore, states, or local school districts must develop "individual education plans" ("IEPs") to identify the special education and related services that meet the needs of each child with disabilities. 20 U.S.C. §1412 (4), 1414 (d)(5); 34 C.F.R. 300.341. 1997 Amend. P.L. 105-17, 111 Stat. 61, §612 (a)(4).

2. **Private School Children**

If the state, or local school district, cannot provide the necessary services in a public school, it can place the child in a private school, at public expense 20 U.S.C. §1413(a)(4)(B); 34 C.F.R. §§300.400-402. 1997 Amend. P.L. 105-17, 111 Stat. 63, §612 (10)(B). If a local school district offers a FAPE to a child and the child's parents nonetheless place the child in a private school, the local school district is not responsible for the cost of the placement. See 34 C.F.R. §300.403; Burlington School Committee v. Dept. of Education, 471 U.S. 359, 359 (1985). The program benefits that are provided to private school children are to be "comparable in quality, scope, and opportunity for

participation to the program benefits provided for students enrolled in public schools", 34 C.F.R. §76.654.

3. Statement of The Facts

At the time this case arose, K.R. was a six year old kindergarten student who has been identified as multiply handicapped. She has a diagnosis of myelomeningocele, spina bifida and hydrocephalus with a shunt. Her disabilities create difficulties for her in expressive language, motor skills and mobility. She needs considerable assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility within the classroom, and expressing her learned knowledge. (Finding of Fact 1, Rec. pp. 15-16, Admin. Rec. pp. 98-99; Joint Exhibits 1,3, and 14, Admin. Rec. pp. 127, 161 and 207; Admin. Tr. pp 421,423,430, 434-436,438, 554-555,564-569.)

Prior to attending Anderson Community Schools, K. R. received services at Logan Center in South Bend, and later at Hopewell after the family moved to Anderson. When K.R. was three, she was enrolled in the pre-school program through Anderson Community Schools. When she became old enough for kindergarten, her parents enrolled her at St. Mary's School, a private parochial School. (Admin. Tr. pp. 592-594)

In the spring and summer of 1993 case conference committee meetings were held to address K.R.'s need for kindergarten. The recommended program for K.R. was placement in a regular kindergarten class with related services of speech therapy, occupational therapy, physical therapy, transportation and a full time instructional assistant. (Joint Exhibit 14, Admin. Rec. pp. 207-227; Admin. Tr. pp. 594-597).

Although there existed a recognized need for an instructional assistant, at the case conference meeting held on August 9, 1993, Anderson Community Schools informed K.R.'s parents it would not provide that service for K.R., if she attended St. Mary's School. (Joint Exhibit 14, Admin. Tr. pp. 423, 435-435, 479) One of the duties of the instructional assistant would be to move K.R. around the classroom. (Admin. Tr. pp. 421-422) K.R. does attend St. Mary's School. Because of the refusal to provide the necessary related service of the instructional assistant, K.R.'s parents requested a due process hearing on August 26, 1993. (Admin. Rec. p. 96, Hrg. Dec., App. p. A-48).

After the denial to provide the instructional assistant by Anderson community Schools on August 3, 1993, the school sent a physical therapist and an occupational therapist, on September 3, 1993, to evaluate physical accessibility at St. Mary's School. (Admin. Rec. pp. 126-128, 443, 458). This was done without notice to K.R.'s parents. (Admin. Rec. p. 447, Admin. Tr. p. 37).

The sole issue for the Administrative hearing was "whether the school corporation should provide an instructional assistant at the private parochial school". (Admin. Rec. p. 96, Hrg. Dec., App. p. A-48). The hearing was held on October 26, 1993, which found that the Anderson Community Schools were not obligated to provide the instructional assistant for K. R. at the private parochial school. (Admin. Rec. pp. 95-106, Hrg. Dec., App. pp. A-48 through A-56).

K. R., by her parents, timely appealed the hearing officer's decision to the Indiana Board of Special Education Appeals; which on April 7, 1994, upheld the decision of the hearing officer. (Admin. Rec. pp. 5-10).

K.R. and her parents timely filed their complaint in the U.S. District Court, Southern District of Indiana on May 6, 1994. The case by agreement, was submitted to the U.S. District Court through briefs, stipulated written evidence, and the record of the administrative hearing, with oral argument heard on April 12, 1995. (Dist. Ct. Op., App. p. A-22)

The district Court entered its opinion on May 25, 1995, which granted the requested relief because the applicable federal regulations require Anderson Community Schools to provide benefits to disabled private school children that are "comparable" to the benefits provided to disabled public school students. (Dist. Ct. Op., App. A-22).

Anderson Community Schools filed its notice of Appeal on June 20, 1995. (Rec. p. 165).

The Seventh Circuit Court of Appeals issued its decision on April 12, 1996, overturning the District Court, ruling:

A. IDEA and its regulations do not require a public school to make comparable provision for a disabled student voluntarily attending private school as for disabled public school students.

B. Public schools are given discretion under the law and need only provide voluntarily placed school students a genuine opportunity for eligible participation.

C. Anderson Community Schools afforded K.R. a genuine opportunity for the service of an instructional assistant at a public school, which she declined, and therefore has discharged its obligation under IDEA. (7th Cir. Op., App. p. A-6)

On April 26, 1996, the K.R. timely filed a Petition For Rehearing which was denied on May 28, 1996 (App pp A-19 through A-20)

On August 26, 1996, K.R. timely filed a Petition for Certiorari to determine:

A. Whether IDEA, and its accompanying regulations required Anderson Community School Corporation to provide K.R., a child with disabilities, an instructional aid on site at a private parochial school.

B. Whether the Anderson Community School Corporation's refusal to provide the necessary instructional aide to K.R., at the private parochial school, violates the neutrality principle of the First Amendment of the U.S. Constitution

On June 27, 1997, the Supreme Court of the United States granted certiorari, and remanded the case to the Seventh Circuit Court of Appeals for further consideration in light of the Individuals with Disabilities Act Amendments of 1997.(App. p. A-5)

The Seventh Circuit Court of Appeals issued its decision on September 10, 1997, again revising the District Court ruling:

A. The 1997 Amendments did not call into question its prior decision.

B. The 1997 Amendments show that states and localities have no obligation to spend their money to make comparable provision for a disabled student voluntarily attending private school as for disabled public school students.

C. Anderson Community School has not infringed on K.R.'s right to exercise her religion nor conveyed any message of governmental enforcement or disapproval of K.R.'s religion.
(App. pp. A-4)

K.R. now petitions the Court for Writ of Certiorari.

BASIS OF FEDERAL JURISDICTION

20 U.S.C. §1415 (E) (2) Judicial Review and resolution of Individuals with Disabilities Education Act (IDEA) dispute. Also PL 105-17, 111 Stat. 92, § 615(i)(2),(3).

42 U.S.C. §1983 Protecting citizens against state or local action depriving them of rights secured by the Constitution and Federal statutes.

ARGUMENT

I. WHETHER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), AND THE ACT AMENDMENTS of 1997 AND ACCOMPANYING REGULATIONS, REQUIRES ANDERSON COMMUNITY SCHOOL CORPORATION TO PROVIDE K.R., A CHILD WITH DISABILITIES AS DEFINED IN IDEA, AN INSTRUCTIONAL ASSISTANT ON SITE AT A PRIVATE PAROCHIAL SCHOOL WHERE K.R.'S PARENTS HAVE VOLUNTARILY CHOSEN TO ENROLL HER.

It is important for the Supreme Court to grant certiorari in this case, because the Court of Appeals for the Seventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court, and the Court of Appeals for the Tenth Circuit. See Rule 10, Rules of the United States Supreme Court.

A. The Court of Appeals decision conflicts with the holding of the Supreme Court in Zobrest v. Catalina

Foothills School District, 113 S.Ct. 2462 (U.S. 1993). In Zobrest the United States Supreme Court has determined that there is choice for such privately placed students as K.R. The case dealt with need for the service of an interpreter for a deaf child at a private school. The Court stated in Zobrest, at 2467:

> "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the 'sectarian-nonsectarian, or public- non public nature' of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents".

The issue of choice as provided under IDEA to parents has been decided by Zobrest and the decision by the Court of Appeals is now in conflict with that determination. It should also be noted that Zobrest is a later decision than the Goodall v. Stafford County Schl. Bd., 930 F.2d 363 (4th Cir.1991) decision, on which the Court of Appeals relied. The decision rendered by the Court of Appeals, by deciding to agree with the Fourth Circuit in Goodall, has reached the conclusion that the essential component of this service to be provided is merely that of opportunity. (7th Cir Dec., App. pp. A-6 through A-18.) The most crushing portion of this decision is the flawed reasoning that where the public school makes available necessary service at a public school, in this case Anderson Community Schools, which gives the disabled student a genuine opportunity to participate, the public school has discharged its obligation. (7th Cir. Dec., App. pp.

A-6 through A-18) The Court of Appeals then reasons that because K.R. was not prevented from attending the public school by anything other than a desire to attend private school, she was provided with a genuine opportunity which she rejected. (7th Cir. Dec., App. pp. A-6 through A-18) This reasoning is in conflict with the provision of the Act, as set forth above, which provides choice to parents to place their children at public or private school. If the very most important service needed by K.R., in order for her to facilitate her educational development, can only be received if she attends Anderson Public Schools, then what is her choice with regard to being able to attend private school? The reality is she has no choice.

The strongest driving force in the decision of the Court of Appeals in K.R. was the Court's characterization that the language in the statute, particularly 20 U.S.C.§ 1413(a)(4)(A) was limiting as to what necessary services disabled children are entitled to, in order to meet their unique needs, when parents voluntarily enroll them in a private school. The Court emphasized that this statute calls for providing something different.

20 U.S.C. §1413(a)(4)(A) provides that, "to the extent consistent with the numb[illegible]nd location of children with disabilities in the State w[illegible]re enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services..." This language has not been changed as evidenced in the 1997 amendments, P.L. 105-17, 111 Stat. 62 §612(a)(10)(A)(i).

The Court of Appeals decision, however, fails to provide any authority for the alleged limitation it characterizes as so implicit in 20 U.S.C.§1413(a)(4)(A).

At the outset certain other differences should be distinguished. First, local school boards have a wide discretion in designing and developing their special education programs. 34 C.F.R.§76.652. K.R. seeks only the provision of an instructional assistant at her private school.

With that in mind, it is necessary that the statute at issue be reviewed. Under the decision by the Court of Appeals, the Department of Education's interpretation, which it adopted in its opinion, is that 20 U.S.C.§1413(a)(4)(A) is intended to be a lesser entitlement/requirement for children voluntarily enrolled in private schools as opposed to those disabled children enrolled in public schools and those students publicly placed or referred to a private school by a public agency (publicly placed).

With due respect to the decision of the Court of Appeals, there is nothing in the statute or regulations which supports the supposition that 20 U.S.C.§1413 (a)(4)(A) limits the provisions of services to any sub-class of disabled children qualified under the IDEA. The very intent of Congress was to ensure inclusion, not exclusion of voluntarily enrolled qualified disabled children in private schools under the IDEA. It is beyond logic to assume that an Act of Congress intending to grant legal/statutory rights upon all qualified disabled children, under such a powerful act as the IDEA, would incorporate a gaping loophole that would allow denial derived from discretion over the individual statutory rights and needs of a qualified handicapped child, just because that child's parents select a parochial school for that child's general education.

The Plaintiffs do not believe that Part B of the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Act

Amendment of 1997 has either resolved or disposed of the issues originally raised in this case.

Plaintiffs submit that instead of clarifying the question of whether K.R. is entitled to service at her private parochial school, the question is at best unchanged, and at worst further confused.

The IDEA (as amended) states that part of its purposes under P.L. 105-17, 111 Stat. 42 §601 (d) are:

> "(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.
> (B) to insure that the rights of children with disabilities and parents of such children are protected and
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."

Clearly, the purpose of IDEA (as amended) is to ensure provision of services to all children and makes no distinction in its purpose between public and private school children with disabilities.

The IDEA (as amended) further states that in order for a state to be eligible for assistance, it must demonstrate that it has in effect policies and procedures to ensure that the state meets certain conditions in P.L. 105-17, 111 Stat. 60 §612(a), one of which is:

> "(1) Free Appropriate Public Education

(A) In General-A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive,..."

Another condition that a state must meet under P.L. 105-17, 111 Stat. 61 §612(a) is:

"(3) Child Find-

(A) In General-All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are identified, located, and evaluated and a practical method developed and implemented to determine which children with disabilities are currently receiving needed special education and related services."

The State eligibility requirements under P.L. 105-17, 111 Stat. 60 §612(a) to this point also appear to refer to all children with disabilities, and make no distinction between public an private school children with disabilities. No distinction between public and private school children is discussed under §612(a) until P.L. 105-17, 111 Stat. 62 §612(a)(10)(A)(i)(I):

"(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part."

This section limits the Federal requirements of P.L. 105-17, 111 Stat. 60 §610(a)(10)(A)(i) which provides for participation by children in the program who are enrolled by their parents in private elementary and secondary schools as K.R. is.

While the IDEA (as amended) clarifies that school districts must use a proportional amount of federal funds for services to children attending private schools, the Act is silent as to the specific use of state and local resources to meet this obligation to private school students. Had it been the specific intent of Congress to severely limit services to private school students with disabilities or to waive any required application of state and local funding for providing services, the IDEA Amendments Act could have so stated unequivocally, and it does not do so.

An individualized education program must be developed "for each child with a disability." P.L. 105-17, 111 Stat. 61 §612(a)(4). It's contradictory to require states to provide full educational opportunity for all children with disabilities, and to identify, evaluate and develop individualized education programs for all children with disabilities, including private school children, if the states do not have to participate in the actual provision of the necessary services.

B. The very purpose of IDEA funding is to assist rather than supplant the states in meeting educational needs of all children with disabilities. The section of the IDEA addressing services to private school children with disabilities specifically states that provision be made for the participation of children "assisted or carried out under this part..." P.L. 105-17, 111 Stat. 62 §612(a)(10)(A). This section, insofar as it totally supplants the use of state and local funding, cannot be reconciled with the requirements that the states supplement rather than supplant their use of state and local funds for the provision of services

to all children with disabilities. P.L. 105-17, 111 Stat. 68 §612(a)(18)(C) specifically prohibits supplantation:

> "PROHIBITION AGAINST AND CONDITIONS FOR WAIVER BY SECRETARY..., funds paid to a State under this part will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State."

As this section provides no exception for P.L. 105-17, 111 Stat. 62 §612(a)(10)(A)(i)(I) , it leaves these two sections of the IDEA (as amended) in conflict with one another. For the State or local educational unit not to use State money for provision of services to children with disabilities in private schools is a direct violation of §612(a)(18)(C). This is in direct conflict with the finding by the Court of Appeals that there is no ambiguity in the Amendments. (7th Cir. Dec. App pp A-1 through A-4.

Nowhere in the Act does the statutory language state that only "some" qualified disabled children under the IDEA

voluntarily enrolled in private school will be provided "some" services necessary to meet that child's unique needs.

It should be noted that it is correct that a public agency may elect not to serve every parentally-placed child residing in its jurisdiction and that not all handicapped children are required to be served; these obligations differ only because some handicaps do not meet the definition or criteria, and severity to become statutorily protected under the IDEA.

B. The Court of Appeals decision has eliminated K.R.'s entitlement to services, because she is enrolled in a private school by choice of her parents. This is in conflict with the decision of the United States Supreme Court in Board of Kiryas Joel Village School District v. District of Grumet, 114 S.Ct. 2481 (1994), which at 2485 states:

> "These schools do not however, offer any distinctive services to handicapped children, who are entitled to special education services even when enrolled in private schools."

The decision of the Court of Appeals states that Congress intended to give disabled students voluntarily attending private school a lesser entitlement (7th Cir. Dec., App. pp. A-6 through A-18 reaffirmed 7th Cir. Decision, App. pp. A1-A4)

Petitioners submit that through the process of consultation with representatives of private schools, by the LEA, in locating potentially qualified disabled children in private schools, that those suspected children must be evaluated as required under the regulation 34 C.F.R.§ 300.128. Further, once qualified as disabled under the IDEA, those children,

whether enrolled in a public or private school are statutorily protected and entitled to services to meet their unique needs. Kiryas Joel v. Grumet, 114 S.Ct. 2481(1994). See also, Felter v. Cape Girardeau School District, 830 F. Supp. 1279 (E.D.Mo.1993).

More important, however, is the fact that 20 U.S.C. §1413(a)(4)(A) specifies both the scope of its command and the manner in which the "participation" of private school children must be achieved. The statute does not state that such children are to be served "to the extent consistent with the School's budget," and it most certainly does not state that they are to be served "to the extent that the School Board 'elects' to serve them". There is no such language in the 1997 Amendments to IDEA either.

C. The decision of the Court of Appeals changes the definition of "comparable benefits" to be provided privately placed disabled school children, and in doing so is in conflict with Wheeler v. Barrera, 417 U.S. 402, 94 S.Ct. 247 (1974). The Court of Appeals states at pages 10 and 11 of its decision:

> "Where the public school makes available the necessary service as a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused its discretion, the public school has discharged its obligation."

The Court of Appeals is quoting from Goodall, Supra, at 368-369. In Wheeler, the U.S. Supreme Court construed Title One of the Elementary and Secondary Education Act of 1965 and its regulations. The language of this statute and its

regulations is virtually identical with that of the IDEA, its regulations and EDGAR (Education Department General Administrative Regulations). The ESEA regulations state:

> The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools. 45 CFR §116.19(b).

In comparison, the EDGAR regulations state:

> Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools. 34 CFR 76.654(a).

Because the language of Title I is so similar to the language which Congress subsequently used in the IDEA, and because the Title I regulations essentially became the EDGAR regulations affecting all the subsequently adopted education titles (including IDEA), the Supreme Court's construction of

Title I and its regulations shows conclusively how the Supreme Court would interpret IDEA and its regulations.

The Court of Appeals states that K.R. has based her argument partly on regulations of the United States Department of Education, they must be deemed superseded by the 1997 Amendments to the extent that any of them are inconsistent. (App. p. 3) Petitioners agree, and acknowledge that the U.S. Department of Education has issued proposed regulations, but the proposed regulations do not propose any changes to the EDGAR regulations in general or to 34 C.F.R. 76.654(a) specifically, and to petitioner's knowledge do not intend to. Which still leaves a conflict between the 1997 Amendments and 34 C.F.R. 76.654(a), which will not be resolved unless reviewed by this Court.

In Wheeler, parents of parochial school students in Kansas City, Missouri, brought a class action against the public school system alleging that the public system had received Title I (remedial education) money and spent it to provide remedial education teachers in public schools, but not in private schools. Therefore, the private school students were not receiving a comparable benefit as required by the act. The Supreme Court ruled in favor of the parents, finding:

1. It was not comparable to give materials and equipment both in public and private schools, to give teachers in public schools, and nothing more for private school children. The mere offer to let private school children come to the public school system to receive the benefit Congress intended, did not comply with the statute's mandate. (emphasis added) Wheeler, Id. at 422-425.

If public schools merely have to make the services available at the public school, the regulations pertaining to

private school students serve no purpose, for K.R. would no longer be a private school student if she attended ACS.

The District Court thoroughly discussed 34 C.F.R. §76.654(a) dealing with comparable benefits, and its application in this case, (Dist. Ct. Op. App. pp. A-28 to A-36). In so doing, the District Court discussed among other cases Goodall, where the parents of a hearing impaired child wanted a public school system to provide a cued speech interpreter at the private school where they had chosen to place the child. (Dist. Ct. Op. App. p. A-30). The District Court further found that the Goodall determination of 34 C.F.R. §76.532 would not undermine the rights granted to private school students under 34 C.F.R. 76.654(a) after the decision by the Supreme Court in Zobrest. (Dist. Ct. Op. p. A-34) The best reasoning on the meaning of "comparable benefits" is still that of Judge Hamilton of the District Court, that, "No benefits are not the "comparable" benefits required by §76.654(a)". (Dist. Ct. Op. App. p.A-31) Petitioners submit that the Court of Appeals definition of "comparable benefits" is directly in conflict with the decision in Wheeler.

The Court of Appeals ignored Wheeler. If it is no longer good or applicable law, that should come from a clear ruling by the Supreme Court; not the failure of the Court of Appeals to apply it in a case in which it is plainly applicable, if it is valid law. Agostini v. Felton, et al, 117 S.Ct. 1997, 2017 (1997); Rodriguez de Quijas, 490 U.S., at 477, 484, 109 S.Ct. 1917, 1921-1922 (1989).

D. The decision of the Court of Appeals for the Seventh Circuit is now in direct conflict with a decision of the Court of Appeals for the Tenth Circuit. In Fowler v. Unified Sch. Dist. N. 259, 1997 WL 686039 (10th Cir 1997), the Court of Appeals for the Tenth Circuit on November 4,

1997 decided a case virtually on point with the case at bar, which was remanded by this Court at the same time as the instant case, and criticized the interpretation of the IDEA made by the Court of Appeals for the Seventh Circuit in the instant case. The case involves a profoundly deaf twelve year old boy who needs the services of an interpreter, and was voluntarily place in a private nonsectarian school, Fowler at page 5 finds:

> "Congress' subsequent amendment [of the IDEA]...in no way undermine the reasoning of [a prior case] interpreting an ambiguous provision of the IDEA. This up to June 4, 1997, the District is obligated to pay for interpretive services for Michael at his private school, an amount up to , but not more than, the average cost to the District to provide that same service to hearing impaired students in the public school setting."

Fowler further states:

> "The Act does not make clear, however, whether an equal share of the Federal funds must be allocated for each disabled child enrolled in a private school, or whether the proportionate amount must be allocated for disabled private school students collectively. In the latter case, any particular disabled private school student might receive an amount different from his or her individual proportionate share, and, conceivably could receive nothing. Moreover it is not clear whether the local educational agency must

> spend a proportionate share of Federal funds on all special education and related services needed by private school disabled students, or whether it has discretion to determine which services it will provide to which students. Id. at 6.

Fowler also states at FN5, page 6:

> "On the other hand, the Act appears to address all private school students, and does not evidently contemplate that some voluntarily placed private school students will receive no services."

The Fowler Court again reaffirmed its prior decision in favor of services for the child. but remanded to the District Court for further factual deliberation under state law. Previously in Russman v. Bd. of Education of the Enlarged City School Dist. of Watervliet, 85 F. 3d 1050 (1996), the Court of Appeals for the Second Circuit made a similar finding with regard to IDEA prior to the amendments of 1997. It is now pending a decision form the Second Circuit as part of the same remand from this Court at is this case.

In deference to the Court of Appeals, it cites the recent decision of Cefalu v. East Baton Rouge Parish School Board, 117 F.3d 231, (5th Cir. 1997) as support of its decision.

The above mentioned cases further emphasize the need for the Court to grant certiorari, as they illustrate the split of authority in interpreting the IDEA, including the 1997 Amendments, and its regulations, in the different

Districts. It is obvious that this split will only continue to grow if this Court does not grant Certiorari.

II. WHETHER THE ANDERSON COMMUNITY SCHOOL CORPORATION'S CONDUCT, OF REFUSING TO PROVIDE THE NECESSARY INSTRUCTIONAL ASSISTANT TO K.R. AT THE PRIVATE PAROCHIAL SCHOOL, VIOLATES THE NEUTRALITY PRINCIPLE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

It is important that the Supreme Court grant certiorari in this case, because the decision of the Court of Appeals for the Seventh Circuit denying the requested instructional aid in the parochial school violates the neutrality principle consistently found by the United States Supreme Court to be inherent in the establishment clause of the First Amendment to the United States Constitution.

The establishment clause of the First Amendment to the United States Constitution has long been held to require the government to maintain a posture of strict neutrality in the manner it deals with the religious beliefs of its citizens Everson v. Bd. of Educ., 330 U.S. 1, 91 L.Ed. 2d. 711 (1946), Bd. Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968), Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983). The decision by the Court of Appeals for the Seventh Circuit enables a governmental entity, Respondent Anderson Community School Corporation, to maintain a hostile position that places a heavy burden on Petitioner's freedom to place their child in a parochial school due to their sincerely held religious beliefs, in violation of the establishment clause.

Respondent acknowledges that they would freely agree to provide an instructional aid to Petitioner were she to attend their public school (Joint Exhibit 14, Admin. Tr. pp. 423, 435, 479); yet they refuse to do so if she attends a parochial school. Due to Petitioner's numerous and severe physical problems, an instructional aid is absolutely necessary for her to be able to attend any school, public or private. In fact, throughout the administrative proceedings and most of the litigation below in this case, K.R.'s mother has accompanied her daughter to school and served as her instructional aid; obviously a substantial burden on her daily activities. The parent's only other options are to hire an instructional aid themselves, which would of course present a great financial burden to the parents, or surrender their right to direct the education of their child in accordance with their religious beliefs, which would deny them their rights under the United States Constitution. A posture of neutrality on Respondent's part, as required by the Establishment Clause, would prohibit them from placing such burdens on K.R.'s educational choices. This Court has held:

> ...the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. Everson v. Bd. of Educ., Id.at 724.

The Supreme Court has continued to uphold this principle in several other decisions:

> We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and

evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 114 S. Ct. 2481, 2491, 129 L.Ed. 2d 546 (1994)

We have time again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship." Id at 2497

The attitude of government toward religion must, as this court has frequently observed, be one of neutrality...it requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief. Board of Education v. Allen, 392 U.S. 2236, 249, 20 L. Ed. 2d 1060, 1069, 88 S. Ct. 1923 (1968)

[When the government] conveys a message of government enforcement or disapproval of a religion, the core purpose of the establishment clause is violated. Grand Rapids School District v. Ball, 473 U. S. 373, 389, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1975)

The requirement of neutrality toward religious practices was reaffirmed by this Court in the recent case of Rosenberger v. Rector and Visitors of the University of

Virginia, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). As this Court held in that case:

> Through our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. Id at 2532

As stated above, Anderson Community School Corporation refuses to provide an instructional aid to K. R. at the parochial school, yet acknowledges that it would freely provide the aid on the grounds of the public school. Instructional aids are commonly provided at sites outside public schools, for example in hospitals, corrections facilities, and indeed, in certain private schools. Their refusal to provide the instructional aid at this particular school evidences hostility and bias toward parochial schools and places a substantial, and for some individuals, financially prohibitive burden on their right to choose a religious curriculum for their child's education. The resulting restriction of religious choice is a clear violation of the neutrality required on the part of government by the Establishment Clause of the First Amendment. The decision by the Court of Appeals in reversing the District Court's order to the school to provide the requested aid, does not agree with this Court's numerous and consistent rulings enforcing the protections inherent in the Establishment Clause of the First Amendment. the Court of Appeals incorrectly quotes the facts as a response to K.R.'s position that the 1997 Amendments, P.L. 105-17, 111 Stat. 37

through 157, violates the First Amendment. K.R. has always received speech therapy at the public school, but the services of occupational therapy and physical therapy have always been provided on the premises of the parochial school. (Joint Exhibit 14, Admin. Rec. pp. 594-597). Further, the Court of Appeals does not appear to consider the recent decision of the Court. Agostini, Id at 2010:

> We continue to explore whether the aid has the effect of advancing or inhibiting religion." As such, that decision should not be allowed to stand.

Finally, thought the Court of Appeals acknowledges that the 1997 Amendments are not retroactive, with which Petitioner agrees, there still is left a split of authority regarding K.R.'s right to services for the period from 1993 through June 4, 1997, which has not been resolved.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Appendix

United States Court of Appeals

for the Seventh Circuit

No. 95-2497

K.R., an infant, by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.

Plaintiffs-Appellees,

v.

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis, Division.
No. 94 C 766-**David F. Hamilton**, Judge.

Before Cummings, Easterbrook and Diane P. Wood, Circuit Judges.

Cummings, Circuit Judge, In April 1996 we held that the Individuals with Disabilities Education Act, 20 U.S. C. §§ 1400 et seq., and the regulations thereunder did not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. 81 F.3d 673 (7th Cir. 1996). We added that public schools are given discretion under the law and need only provide voluntarily place private school

students a genuine opportunity for equitable participation. Anderson Community School afforded plaintiff K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. We added that the public school's provision of other related services demonstrated that is reasonably exercised its discretion rather than eschewed its responsibility once K.R. chose to attend private school. Therefore the decision of the district court was reversed. Id.

Plaintiffs'' petition of certiorari was granted on June 27, 1997, and the case was remanded for us to give consideration to the Individuals Education Act Amendments of 1997, PL 105-17, 111 Stat. 37. After the case was returned to this Court, the plaintiffs stated that they did not believe that the Amendments "either resolved or disposed of the issues originally raised." The defendant school corporation advised that the Amendments "provide strong ammunition that the Court should not change its holding. Similarly, the United States filed a statement of position that the 1997 Amendments do not call into question our prior decision and concluded that the Amendments foreclose any prospect of relief. Therefore all parties agree that the 1997 Amendments do not impugn our prior holding.

As the government points, the Amendments unambiguously show that participating states and localities have no obligation to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly funded special-education services generally "comparable" to those provided to public-school children.

In Section 101 of the IDEA Amendments Act, which amended § 612(a)(10) of the IDEA, Congress explained that,

> ... this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

111 Stat. 63. In light of this legislative clarification, we must again reverse the decision of the district court, which had required the defendant school board to pay for the cost of an instructional assistant fur use by plaintiff K.R. while attending classes at a private parochial school.* To the same effect, see Cefalu v. East Baton Rouge Parish School Board, 117. F.3d 231 (5th Cir. 1997).

Although plaintiffs have based their argument partly on regulations of the U.S. Department of Education , they must be deemed superseded by the 1997 Amendments to the extent that any of them are inconsistent. According to the United States, new regulations are being developed based on the 1997 Amendments.

Finally, plaintiffs now contend that defendant's system violates the First Amendment. This ignores the fact that

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K.R. also asserts that this Court must reach a result regarding K.R.'s situation from August 1993 until June 1994, when the IDEA Amendments Act became law, because this Court's prior decision was vacated when this case was remanded to us from the Supreme Court. However, even if we were to view the IDEA Amendments Act as not clarifying the IDEA on this issue but instead creating a change in the law

(a view which we do not here adopt), that change surely is not applicable to the time preceding the passage of the IDEA Amendments Act, as the Act does not specify retroactive application. See Section 201 of the IDEA Amendments Act, 111 Stat. 156.

Anderson Community School provided K.R. with Speech Therapy, occupational therapy and physical therapy at a public school site while she attended parochial school. Anderson Community School has neither infringed on K.R.'s right to fully exercise her religious choice, nor has it conveyed any message of governmental enforcement or disapproval of K.R.'s religion.

As shown, the Individuals with Disabilities Education Act Amendments of 1997 reinforce our 1996 opinion. Therefore the decision of the district court is again reversed.

A true Copy:
Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

Supreme Court of the United States

No. 96-323

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, ET AL.,

Petitioners

v.

ANDERSON COMMUNITY SCHOOL CORPORATION

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of ht Individuals with Disabilities Education Act Amendments of 1997.

IT IS FURTHER ORDERED that the petitioners K.R., an infant by Her Parents and Next Friends, et al., recover from Anderson Community School Corporation Three Hundred Dollars ($300.00) for their costs herein expended.

June 27, 1997

Clerk's costs: $300.00

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-2497

K.R., an infant, by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Plaintiffs-Appellees,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 94 C 766—David F. Hamilton, *Judge.*

ARGUED FEBRUARY 22, 1996—DECIDED APRIL 12, 1996

Before CUMMINGS, EASTERBROOK and DIANE P. WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* K.R. is a multiply handicapped student in need of a full-time instructional assistant to attend school. If K.R. attended public school, she would indisputably be entitled to all services prescribed by her individual education plan ("IEP") under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. ("IDEA"), including the instructional assistant. However, K.R.'s parents have opted out of the public system and have voluntarily placed K.R. in a private parochial school. The question, therefore, is whether the IDEA or its accompanying regulations require Anderson Community Schools

to provide the instructional assistant at the private school. The district court held that the public school was obligated to provide the service and issued a permanent injunction and declaratory judgment in favor of K.R. Because the IDEA and its regulations do not entitle K.R. to the full range of services at a private school, but rather give the public school discretion in cases such as this, we now reverse.

I.

It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-1994 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional

assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's, the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the district court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the district court. On May 25, 1995, the district court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. *K.R. ex rel. M.R. v. Anderson Community Sch. Corp.*, 887 F. Supp. 1217 (S.D. Ind. 1995). The district court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

II.

The IDEA's statutory scheme is typical of a federal granting program. The statute provides federal grants to states, which in turn fund local school districts, for assistance in educating disabled students. The states that elect to participate in the program receive a grant of not more than forty percent of the average per pupil expenditure for all students nationwide multiplied by the number of disabled students in the particular state receiving the

grant. 20 U.S.C. § 1411(a). According to the United States Department of Education ("DOE"), federal grants supply only about eight percent of the funds needed to provide disabled students with special services. Nonetheless, a state that accepts IDEA grants must have in effect a policy that "assures all children with disabilities the right to a free appropriate public education" and a plan that assures such an education will be available. 20 U.S.C. § 1412(1) & (2)(B). The local school district must prepare for each disabled child an IEP that identifies the special education and related services that are necessary to meet that child's needs, and the district must then offer to provide those services at full public expense. 20 U.S.C. §§ 1412(4), 1414(a)(5). The district must place the child in a private school at public expense if it is unable to provide the necessary services in a public school. 20 U.S.C. § 1413(a)(4)(B).

The statute and accompanying regulations then specifically address the situation where parents voluntarily place their child in a private school. The statute requires that each state's plan

> set forth policies and procedures to assure—
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . . .

20 U.S.C. § 1413(a)(4). The regulations help clarify the public school's obligation with respect to disabled students in private schools. If the parents voluntarily place their child in a private school, "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452." 34 C.F.R. § 300.403. In turn, Section

grant. 20 U.S.C. § 1411(a). According to the United States Department of Education ("DOE"), federal grants supply only about eight percent of the funds needed to provide disabled students with special services. Nonetheless, a state that accepts IDEA grants must have in effect a policy that "assures all children with disabilities the right to a free appropriate public education" and a plan that assures such an education will be available. 20 U.S.C. § 1412(1) & (2)(B). The local school district must prepare for each disabled child an IEP that identifies the special education and related services that are necessary to meet that child's needs, and the district must then offer to provide those services at full public expense. 20 U.S.C. §§ 1412(4), 1414(a)(5). The district must place the child in a private school at public expense if it is unable to provide the necessary services in a public school. 20 U.S.C. § 1413(a)(4)(B).

The statute and accompanying regulations then specifically address the situation where parents voluntarily place their child in a private school. The statute requires that each state's plan

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20 U.S.C. § 1413(a)(4). The regulations help clarify the public school's obligation with respect to disabled students in private schools. If the parents voluntarily place their child in a private school, "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452." 34 C.F.R. § 300.403. In turn, Section

300.452 states, "[e]ach [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." 34 C.F.R. § 300.452. Section 300.451 further requires the local agency to ensure that, "[t]o the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services . . . ." 34 C.F.R. § 300.451.

Section 300.451 also requires the local agency to meet the requirements of 34 C.F.R. §§ 76.651-76.662 (we will call this series of regulations the "cross-referenced" regulations). 34 C.F.R. § 300.451(b). These cross-referenced regulations address conditions that the state and the subgrantees (local public schools) must meet regarding students in private schools, and they form the basis of the district court's opinion. Under these regulations, the local agency "shall provide students enrolled in private schools with a genuine opportunity for equitable participation" and do so "in a manner that is consistent with the number of eligible private school students and their needs." 34 C.F.R. § 76.651(a)(1) & (2). It shall consult with students' representatives regarding which children will receive benefits, what benefits they will receive, how the children's needs will be identified, and how the benefits will be provided. 34 C.F.R. § 76.652(a). Further, the local agency shall determine the following "on a basis comparable to that used" for public school students:

> (a) The needs of students enrolled in private schools.
>
> (b) The number of those students who will participate in a project.
>
> (c) The benefits that the [agency] will provide under the program to those students.

34 C.F.R. § 76.653. Finally, at least for our purposes, "[t]he program benefits that [an agency] provides for students enrolled in private schools must be comparable in

quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a).

III.

The district court rested its decision entirely on what it called the "plain language" of Section 76.654(a) that requires "comparable" benefits. 887 F. Supp. at 1223. Because K.R. would receive an instructional assistant in the public school, the court concluded that she was entitled to a comparable benefit in the private school. The district court stated that "comparable" did not mean "identical"—the only limitation on "comparable" that it acknowledged—but concluded that a full-time instructional assistant was the only comparable alternative. *Id.* at 1225. The court's analysis is problematic because it focused only on one section of a rather complex set of statutory and regulatory provisions. And not insignificantly, the district court's conclusion contradicts the conventional understanding of the IDEA, including the DOE's understanding.

Setting the regulations to one side, the statutory provisions make clear that Congress did not intend public schools to provide disabled students who are voluntarily placed in private schools with benefits comparable to those of disabled public school students in all instances. The IDEA refers to three categories of disabled students: those attending public school, those placed in private school by the local school district, and those attending private school voluntarily. For students attending public school, the statute requires in no uncertain terms that *all* children with disabilities receive a free appropriate public education that covers the expense of *all* special education and related services. 20 U.S.C. §§ 1412(1) & (2)(B), 1412(4), 1414(a)(5). In stark contrast is the provision governing students voluntarily placed in private school. It requires only that "provision is made for the participation of such children" in the local IDEA program, and even at that, only "to the extent consistent with the number

and location of children with disabilities" enrolled in private schools. 20 U.S.C. § 1413(a)(4)(A). And if any doubt is left that Congress intended a lesser requirement in Section 1413(a)(4)(A) for children voluntarily placed in private school, the very next subsection mandates that children placed in private school *by the local school district* receive the same benefits as children attending public school. 20 U.S.C. § 1413(a)(4)(B). Thus Congress not only differentiated between public and private schools, but also between children voluntarily attending private school and children placed in private school by the local school district. The statute leaves little doubt that, of the three groups, Congress intended to give disabled students voluntarily attending private school a lesser entitlement.

The regulations adopted under the IDEA in no way undermine the conclusion that public schools need not provide comparable benefits to students voluntarily attending private school in every instance. They in fact demonstrate that when dealing with such students, the public school has discretion over what services to provide. The regulations track the statute in differentiating the three categories of disabled students. Thus they require that all children with disabilities receive a free appropriate public education, 34 C.F.R. §§ 300.121 & 300.126, but separately address the requirements for disabled children placed in, or voluntarily attending, private school. 34 C.F.R. §§ 300.400-300.487. Children placed in private school by the local school district have "all of the rights of a child with a disability who is served by a public agency." 34 C.F.R. § 300.401(b). However, children voluntarily attending private school are governed by different regulations—regulations which state that the public school need not pay for the child's education, 34 C.F.R. § 300.403(a), and that provision must be made for participation in special education and related services, but only to the extent consistent with the number of disabled private school children in the State. 34 C.F.R. § 300.451(a).

It is abundantly clear from the distinctions drawn in both the statute and the regulations that neither Congress

nor the DOE intended for public schools to provide students such as K.R. with services comparable to what she would receive in the public school. If Congress or the DOE had so intended, there would have been no need to draft separate provisions for the three categories of students referenced by the drafters. In light of all this, one would not expect to find that the cross-referenced regulations, 34 C.F.R. §§ 76.651-76.662, altered the clear statutory and regulatory scheme. Indeed, those regulations make clear that the public school has a great deal of discretion in providing benefits to disabled private school students. The public school need only provide "a genuine opportunity for equitable participation," 34 C.F.R. § 76.651(a)(1), and it must consult with representatives of the student to determine, among other things, *which* children will receive benefits and *what* benefits will be provided. 34 C.F.R. § 76.652(a)(1) & (3). The consultation mandated under Section 76.652 is entirely separate from the consultation required to formulate the IEP.

Only Section 76.654(a), relied upon by the district court, lends support to the notion that disabled students voluntarily attending private school must be treated the same as public school students. It states that the "program benefits that [an agency] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a). But read in light of the statutory scheme outlined above and the other regulations, which precisely track the statutory division of public and private school students, the only reasonable interpretation of Section 76.654(a) is that the comparability requirement is limited to the "program benefits that [an agency] provides." Sections 76.651 and 76.652 explicitly give the public school discretion over what benefits to provide; however, when benefits are provided, Section 76.654 requires that they be comparable to benefits for public school students. Section 76.654 is not by its terms a mandate that private school students shall receive full benefits.

Our interpretation of Section 76.654 is guided not only by the text, it is also supported by separation-of-powers principles. An agency does not have authority to invade the province of the legislature by promulgating regulations that contravene the governing statute—in other words, to make law. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214. Thus regulations that are inconsistent with the statute are void. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26; *United States v. Larionoff*, 431 U.S. 864, 873. Given the statutory scheme as outlined above, which clearly affords public schools discretion in providing services to private school students, interpreting "comparable" in Section 76.654 as requiring identical services would render that regulation void as inconsistent with the statute. The district court arguably did not go quite so far, but its determination that a full-time instructional assistant was the only "comparable" alternative (which just happened to be identical to what K.R. would receive at the public school) failed to take into account the discretion afforded public schools in deciding which services to provide. For example, public schools may legitimately regulate the provision of expensive services, such as full-time assistants, in order to ration limited resources across more students. In light of the statutory provisions, "comparable" must be interpreted in a manner that permits public schools discretion in providing services to voluntarily placed private school students.

The district court's interpretation of Section 76.654 is further contradicted by the conventional understanding of the IDEA and its regulations. See *Goodall* ex rel. *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), certiorari denied, 502 U.S. 864. The DOE has consistently interpreted the regulations as giving public schools discretion in providing benefits to students voluntarily attending private school. 45 Fed. Reg. 22570 (1980) (stating that public school need only offer a genuine opportunity for equitable participation, and that what constitutes "genuine opportunity" will "vary widely, depending on local circumstances"); 49 Fed. Reg. 48522 (1984) (interpreting

statute as providing public schools "with the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children"—an interpretation that "has been consistently followed by the Department"); 16 Educ. For Handicapped L. Rep. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on the specific facts of each case); 20 Individuals With Disabilities Educ. L. Rep. 1440 (1994) (agency memorandum stating that private school children do not have an individual entitlement to the full range of services offered public school children, but must only be afforded a genuine opportunity for equitable participation); 22 Individuals With Disabilities Educ. L. Rep. 369 (1994) (response letter stating same). We are aware of no evidence that the IDEA or its regulations have ever been interpreted otherwise. An agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulations. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386. Based on our analysis of the regulations, we find nothing plainly erroneous in the DOE's interpretation nor is it inconsistent with the regulations. We therefore adopt its interpretation as an accurate understanding of the law.

IV.

The only remaining question is whether the public school in this case properly exercised its discretion as outlined in the cross-referenced regulations. The standard is whether the student was provided with a genuine opportunity for equitable participation. We agree with the Fourth Circuit—the only other Circuit to have addressed this issue—that the essential component is that of opportunity. *Goodall*, 930 F.2d at 368. Where the public school makes available the necessary service at a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused

its discretion, the public school has discharged its obligation. See *id.* at 368-369. K.R. was offered the service of a full-time instructional assistant at Anderson Community School. We have no reason to doubt the opportunity was genuine: nothing in the record demonstrates that K.R. was prevented from attending the public school by anything other than a desire to attend private school; and nothing demonstrates that the public school would have failed to provide the instructional assistant had K.R. decided to return. K.R. was thus provided with a genuine opportunity that she rejected.

Most telling, though, is the fact that Anderson Community School did not simply discard its obligations under the IDEA when K.R. chose to attend private school. The public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site during her attendance at St. Mary's. In providing these services at a public site and declining to provide an instructional assistant to a single student in the private school, it is evident that the public school fairly exercised its discretion to consider the number of eligible private school students and their needs in deciding what benefits will be provided. 34 C.F.R. §§ 76.651, 76.652(a)(3). A complete failure to provide any services, especially those that can be provided at a neutral or public school site at flexible times, would be strong evidence that the public school had abused its discretion. But there is no evidence here that Anderson Community School eschewed its responsibility under the IDEA.

V.

We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for

the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the district court is therefore reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—4-12-96

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 28, 1996

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANNE P. WOOD, Circuit Judge

K.R., an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,	)Appeal from the United)States District Court for the)Southern District of Indiana)Indianapolis Division
Plaintiffs-Appellees,	)
No. 95-2497	)No. 94 C 766
vs.	)David Hamilton, Judge
ANDERSON COMMUNITY SCHOOL CORPORATION	)
Defendant-Appellant	)

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellees

on April 26, 1996, and the response of defendant-appellant, all of the judges on the panel have voted to deny a rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

K.R., an infant by her parents and next friends, M.R. and K.R.R., and M.R. and K.R.R.,	)
Plaintiffs,	)
vs.	)
ANDERSON COMMUNITY SCHOOL CORPORATION,	)
Defendant.	)

CAUSE NO. IP 94-766-C H/G

MEMORANDUM OPINION

The central issue in this case is whether the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, requires a local school corporation to provide for a child with disabilities an instructional assistant at a private parochial school. Plaintiffs are K.R., who is seven years old, and her parents. The defendant is the Anderson Community School Corporation. If K.R. attended public school, her disabilities would require the school corporation to provide a full-time instructional assistant to attend class with her. Plaintiffs seek declaratory and injunctive relief to obtain the same assistance for K.R. at the private parochial school she

attends. The court has subject matter jurisdiction under 20 U.S.C. § 1415(e) and 28 U.S.C. § 1331. The court grants the requested relief because the applicable federal regulation requires the school corporation to provide benefits to disabled private school students that are "comparable" to the benefits provided to disabled public school students. The school corporation must provide an instructional assistant for K.R. at St. Mary's School in Anderson, Indiana.[1]

Facts

K.R. has been diagnosed with several serious conditions: myelomeningocele, spina bifida, and hydrocephalus with a shunt. K.R. uses a wheelchair, which helps her achieve some limited mobility. However, she still needs someone to help move her from place to place, to position her, and to secure her so that she can participate in school activities. She also needs assistance in expressing language, both orally, through special speech therapy, and in writing, through compensation for her limited finger dexterity.

When K.R. was three years old, her parents enrolled her in the school corporation's pre-school program. She received there a number of special services. As K.R. approached kindergarten age, the school corporation held case conference committee meetings to develop an "individualized educational

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[1]The parties agreed to submit this case through briefs, stipulated written evidence, and the record of the administrative hearing in this matter. Oral argument was heard on April 12, 1995. This opinion sets forth the court's findings of fact and conclusions of law.

program" for K.R., as required and defined by the IDEA. *See* 20 U.S.C. § 1414(a)(5), 20 U.S.C. § 1401(a)(20). K.R.'s parents attended these meetings. At some point, they expressed a desire, based on their religious beliefs, for K.R. to attend St. Mary's School, a private parochial school, rather than the local public school. Records from as early as April 9, 1993, indicate this possibility.

Three case conference meetings resulted in a final recommendation on August 9, 1993, that K.R. be placed in a regular kindergarten class and be provided with related educational services including speech therapy, occupational therapy, physical therapy, transportation, and the services of an instructional assistant. Occupational and physical therapists would develop ways to transport and position K.R. They in turn would train both K.R.'s classroom teacher and an instructional assistant in the proper methods of transporting and positioning K.R. (A classroom teacher would have "extreme difficulty" providing K.R. assistance without an aide in the classroom.) The therapists would see K.R. approximately once a week to refine her services constantly and to make sure existing assistance was being provided properly. Neither party disputes these recommendations.

At the case conference meeting on August 9, 1993, the school corporation informed K.R.'s parents that it would not provide special services to K.R. at St. Mary's. The school corporation relied on 511 Ind. Admin. Code § 7-4-4(c), which authorizes a school corporation to decide where it will provide special education services. Pursuant to the procedure set forth in the IDEA at 20 U.S.C. § 1415 and in related Indiana regulations, plaintiffs requested on August 26, 1993, a due process hearing to address the school corporation's refusal to provide an instructional assistant at St. Mary's. News of the plaintiffs' request for a hearing apparently prompted the school

corporation to take new action. Without notice to plaintiffs, it sent a physical therapist and an occupational therapist to St. Mary's on September 3, 1993, to evaluate physical accessibility there.

In the meantime, K.R. started kindergarten at St. Mary's that fall. Since then, K.R.'s mother, M.R., has attended school full-time with K.R., serving as the instructional assistant that the school corporation refused to provide. The school district has provided speech therapy, occupational therapy, and physical therapy for K.R. at a public school site, as well as transportation to that site. Plaintiffs do not challenge the location for those services.

A hearing officer presided over an evidentiary hearing on October 26, 1993, which addressed the location for K.R.'s instructional assistant services. School corporation witnesses testified that the positioning methods they used for K.R. in pre-school could also be used at St. Mary's because no special equipment was required. However, they expressed concerns about K.R.'s safety in being transported at St. Mary's.[2]

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[2]St. Mary's School is in a multi-story building that is not wheelchair accessible. School corporation witnesses expressed concern that an instructional assistant would have to carry K.R. up eight steps to enter the building, twenty-four steps to attend art and music classes, twelve steps to attend physical education class, and additional steps up and down for recess and for required services in a church across the street from the school. The school corporation witnesses said that K.R. is more likely to be injured seriously if she falls than an average person would be. They also expressed concern about K.R.'s safety in a potential emergency situation, such as a fire. Plaintiffs do not

(continued...)

Although the school corporation had not based its original refusal to provide an instructional assistant at St. Mary's on this ground, it argued in the hearing (and before this court) that safety was a specific goal expressed in K.R.'s individual education program, and that it cannot in good conscience provide an instructional assistant to K.R. at St. Mary's, thereby facilitating K.R.'s education in violation of the safety goal.

The hearing officer ultimately decided that the school corporation was not obligated to provide the instructional assistant for K.R. at St. Mary's. Plaintiffs appealed to the Indiana Board of Special Education Appeals, which upheld the decision of the hearing officer. Having exhausted their administrative remedies, plaintiffs then filed a complaint with this court. K.R. has nearly completed the first grade at St. Mary's. Her mother, M.R., still attends school with her and serves as her instructional assistant.

The Parties' Claims

K.R. and her parents rely on the IDEA and accompanying regulations which require the school corporation to provide to children in private schools special education services that are "comparable" to those services offered to children in the public school system. Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an instructional assistant, imposes a

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(...continued)
dispute these facts about the physical facilities of the St. Mary's building, but say they are working with St. Mary's to make the school more accessible to K.R. and other disabled children.

substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion and also violates the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.

The school corporation acknowledges K.R.'s need for an instructional assistant, and it is willing to provide an instructional assistant if K.R. and her parents choose for her to attend a public school. However, the school corporation argues that the federal regulations do not entitle K.R. to an instructional assistant at a private school, and it further asserts that an Indiana state regulation gives it the discretion to choose where to provide an instructional assistant. The school corporation denies that its exercise of discretion here violates the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act. Instead, the school corporation claims that providing an instructional assistant for K.R. at St. Mary's would violate the general goal of safety set forth in the individual education plan for K.R., and would violate Article I. Section 6 of the Indiana Constitution, which prohibits expenditures of public funds for the benefit of religious institutions.

Burden of Proof / Standard for Review

In reviewing administrative decisions under the IDEA, a district court must make an independent decision as to whether the requirements of the IDEA have been satisfied. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988). The court must base its decision on a preponderance of the evidence, and may receive and consider evidence not presented earlier in administrative proceedings. 20 U.S.C. § 1415(e)(2). The administrative proceedings must receive "due weight," however, because courts should not

"substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). Thus, as Judge Brooks has described, for most cases, "the standard of review for IDEA cases lies somewhere in between the review accorded an administrative determination and a *de novo* examination." *Elizabeth K. v. Warrick County Sch. Corp.*, 795 F. Supp. 881, 885 (S.D. Ind. 1992). In light of the issues in this case, the standard of review is closer to the *de novo* end of the spectrum. This case does not present any substantial question of educational policy. The parties agree that K.R. needs an instructional assistant. The central dispute here is a matter of law: the interpretation and application of a federal regulation that extends certain rights to disabled children who choose to attend private schools.

IDEA Benefits for Private School Students

The IDEA was enacted in part to "assure the effectiveness of efforts to educate children with disabilities." 20 U.S.C. § 1400(c). The Act emphasizes special education and related services, and provides funding for local school district programs. Regulations adopted pursuant to the IDEA set forth the details of the program. *See* 20 U.S.C. § 1417(b). Local school districts must comply with the federal regulations in order to receive federal funding assistance, which is administered through state agencies.

The IDEA extends benefits to private school students. Specifically, the IDEA itself provides that if a particular child's needs cannot be met in the public school system, that system is still responsible for the child's education, even if it places the child in or refers the child to a private school or facility. 20 U.S.C. § 1413(a)(4); *see also* 34 C.F.R. §§ 300.401 - 300.402. The regulations provide that if a child's needs can be

met in the public school system, and if the parents choose to place the child in a private school or facility, the public system is not required to pay for the child's tuition at the private school. 34 C.F.R. § 300.403(a). That is the situation we have here. However, where parents choose to place a child in a private school, the public system still must "provide special education and related services designed to meet the needs of private school children [as well as public school children] with disabilities residing in the jurisdiction of the [local school district]." 34 C.F.R. § 300.452; *see* 34 C.F.R. § 300.403(a).

In providing special services to private school students, the public school system must meet a number of standards. 34 C.F.R. § 300.451 (applying the more general education regulations, 34 C.F.R. §§ 76.651-76.662). Central in this case is the following standard:

> *Comparable benefits.* The program benefits that a subgrantee [local school district] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

34 C.F.R. § 76.654(a).

The parties agree that if K.R. attended public school, the school corporation would provide an in-class instructional assistant. Plaintiffs therefore argue that the "comparable benefits" provision of 34 C.F.R. § 76.654(a) requires the school corporation to provide an instructional assistant for K.R. at St. Mary's School. They say the school corporation's refusal to provide the benefit of instructional assistant services to K.R. means that the school corporation is not providing her a benefit

"comparable in quality, scope, and opportunity for participation" to the benefit of instructional assistant services provided in a public school for a public school student. Unlike some other services that can be provided from time to time, such as scheduled speech, occupational, and physical therapy, the purpose of an instructional assistant is to provide assistance in the classroom virtually all the time. This particular benefit would be meaningless if the assistant were not at the private school with K.R., in her classroom. Thus, in order for K.R. to receive a benefit comparable to the benefit she would receive if she attended public school, argue the plaintiffs, she must be provided with an instructional assistant at her private school. As explained below, this court agrees.

Published decisions in two federal court cases have directly addressed 34 C.F.R. § 76.654 and have held that it did not require public school systems to provide in private school settings the particular special education services requested by students with disabilities and their families. In *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), the plaintiff parents placed their hearing-impaired child in a private religious school and wanted the local public school system to pay for transportation to the private school. The district court held that § 76.654 did not require the public system to pay for that service:

> The state is not required to provide duplicate services at the private school. Section 76.654 imposes no additional requirement that the state pay for a child's special education and related services when the child's parents decline the free appropriate public education offered by the state and choose to enroll the child in a private school.

676 F. Supp. at 1366. On appeal, the Sixth Circuit did not agree with the district court's rationale but affirmed the judgment, holding that because the particular benefit at issue — transportation — was not designed to meet the special needs of the child, the public school system was not required to provide it as an IDEA service. *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153, 156-57 (6th Cir. 1989) (citing 20 U.S.C. § 1400(c)). *Cf. McNair*, 676 F. Supp. at 1363 ("if transportation services need to be provided to handicapped children in order for them to participate in special education, the state is required to provide transportation service even though such service is not required by the nature of their handicap").

McNair differs from the present case because the services at issue here — those of an instructional assistant — are indisputably tied to K.R.'s special needs. In *McNair*, the district court and the Sixth Circuit noted that the disabled child needed no more transportation services than any other child. 676 F. Supp. at 1363, 1371; 872 F.2d at 155. By providing transportation, the public school district would not have been compensating for a disability, as the IDEA mandates. Instead, it would have been granting a benefit that non-disabled private school students might want but would not be entitled to receive. The reasoning of *McNair* therefore does not apply to this case.

The second case interpreting § 76.654 is *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), in which the parents of a hearing-impaired child wanted a public school system to provide a cued speech interpreter at the private school where they had chosen to enroll the child. Like the instructional assistant plaintiffs seek here, the interpreter would have needed to attend class with the child full-time in order to offer valuable service to him. The Fourth Circuit held that the IDEA and regulations, including 34 C.F.R. § 76.654(a),

did not require the school district to provide the interpreter at the private school. The court concluded: "If the County's offer of services in a public school is 'meaningless' to Matthew [the student], as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law." 930 F.2d at 369.

In the present case, as in *Goodall*, the parents made the decision for the student to attend the private school. If the Fourth Circuit's interpretation of § 76.654(a) in *Goodall* is correct, then this court would need to deny the relief the plaintiffs seek. That result would be contrary to the plain language of § 76.654(a), for it would mean that as applied to the services of an instructional assistant — services essential to K.R.'s education at any school — she would receive no benefits at all because she attends St. Mary's. No benefits are not the "comparable" benefits required by § 76.654(a).

The Fourth Circuit cited four main sources of authority for its decision in *Goodall* on this issue: (1) the district court opinion in *McNair*; (2) the Fourth Circuit's decision, *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991), holding a school district was not required to provide special education services at a public high school closer to plaintiff's house than the school where the services were provided; (3) an IDEA regulation prohibiting use of funds for religious purposes, 34 C.F.R. § 76.532; and (4) a United States Department of Education administrative ruling. *See Goodall*, 930 F.2d at 367-69.

This court disagrees with the Fourth Circuit's reliance on these four sources of authority. First, as explained above, *McNair* dealt with a service that was not sufficiently related to the particular child's needs in order to qualify under the IDEA. Second, *Barnett* dealt with services provided to a public school

student at a public site, and the principal issue was whether the school corporation would be required to duplicate an extensive program of services at another public school more convenient to the plaintiff. 927 F.2d at 152. Neither *McNair* nor *Barnett* addressed the real focus of § 76.654(a) — whether IDEA services provided to private school students must be "comparable" to those provided to public school students.

Third, the regulation cited in *Goodall*, 34 C.F.R. § 76.532, which prohibits use of funds for religious purposes,[3]

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[3]Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:
  (1) Religious worship, instruction, or proselytization
  (2) Equipment or supplies to be used for any activities specified in paragraph (a)(1) of this section.
  (3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.
  (4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:
  (1) Prepare them to enter into a religious vocation; or

(continued...)

must be considered in conjunction with 34 C.F.R. § 76.658, which provides:

> Funds not to benefit a private school.
>
> (a) A subgrantee [school district] may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.
>
> (b) The subgrantee *shall* use program funds to meet the specific needs of students enrolled in private schools, rather than:
>
> (1) The needs of a private school; or
>
> (2) The general needs of the students enrolled in a private school.

(Emphasis added.) Under these two regulations, the question is whether public IDEA funds are used to benefit the private school (by going toward religious worship or instruction, equipment or supplies, physical facilities, or school activities) or are used instead to benefit a particular qualifying IDEA student (by going toward services designed to meet her specific needs). Here, it is clear that funding for an instructional assistant for K.R. would be used to meet her specific needs, not

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(...continued)

> (2) Prepare them to teach theological subjects.

to subsidize St. Mary's more generally as a school or religious institution.

After *Goodall* was decided, the Supreme Court confirmed that § 76.532 does not create any separate regulatory limitation for the IDEA, but "merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the [federal] Establishment Clause." *Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, ___, 113 S.Ct. 2462, 2465 n.7 (1993) (acknowledging that Fourth Circuit placed a different interpretation on § 76.532). Thus, § 76.532 itself should not undermine the rights granted to private school students by § 76.654(a).

Fourth, the cited U.S. Department of Education administrative ruling offers only limited support for the *Goodall* holding.[4] In response to a claim by the school corporation that the particular benefit being sought would violate a state law, the Goodall family requested a "by-pass" from the Department of Education. Under the by-pass procedure, the local school corporation and supervisory state agency would be exempt from the IDEA requirement that

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[4]Agency rulings are entitled to some deference, but "this deference is constrained by [a court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Daniel*, 439 U.S. 551, 566 n.20 (1979)); *Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668, 672 (M.D. Ala. 1992), *vacated after joint motion to dismiss appeal granted* (1993). A court must also honor the clear meaning of a valid regulation, such as 34 C.F.R. § 76.654(a) in this case.

supposedly violated the state constitution or state statute. Instead the federal agency itself would provide the required service. *See* 20 U.S.C. § 1413(d). The Department responded in part:

> [Public educational agencies] do not necessarily have to provide services on the premises of private schools in order to meet their obligations under [the IDEA]. . . . Whether [a local educational agency] would have to provide on-site services to meet the 'equitable participation' requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

Goodall, 16 EHLR 1398, 1399-1400 (1990), *quoted in Goodall*, 930 F.2d at 368. The Department also said: "At most, [a Virginia law] precludes [local educational agencies] from serving children with handicaps on the site of private sectarian schools." *Id.* Given that the Department (1) tied the requirement for on-site IDEA services at a private school to a child's particular needs, (2) implied a Virginia law prohibited Virginia school corporations from providing services at private sectarian schools, and (3) denied the Goodalls' request for a by-pass which would have absolved the school corporation of responsibility but still provided the federally-required IDEA services, it appears that the Department believed the Goodall child's particular needs did not mandate on-site services.

Based on the limited factual information in the *Goodall* opinion, however, it appears to this court that the needed interpreter there could have been useful only on-site, just as plaintiffs here claim an instructional assistant would be useful

to K.R. only on-site. Despite this apparent dissonance, the Department of Education ruling cited by the Fourth Circuit states clearly that whether a public school system must provide a particular service in a private school depends on the facts of the particular situation, and not on a sweeping rule that a school corporation is *never* required to provide IDEA services at a private parochial school. Overall then, this court agrees with the view expressed in the Department of Education ruling cited in *Goodall* but disagrees with the Fourth Circuit's interpretation and application of § 76.654(a).

Regardless of whether the Constitution would compel such a result, Congress and the Department of Education have chosen as a matter of federal educational policy to extend substantial benefits to students in private schools. The IDEA and its regulations tie special education services to students themselves rather than to specific educational sites. *See Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, ___, 113 S.Ct. 2462, 2469 (1993). Those regulations create legally enforceable entitlements for all private school students with disabilities, no matter how they were placed. *See Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668, 671-73 (M.D. Ala. 1992), *vacated after joint motion to dismiss appeal granted* (1993). By requiring program benefits for private school students that are "comparable in quality, scope, and opportunity for participation" to those offered to public school students, § 76.654(a) is plainly designed to remove (or at least to minimize) a child's disability as a factor for the child and her parents to consider in choosing between a public school and a private school. Thus, under § 76.654(a), a disabled child and her parents should have essentially the same practical choice between the local public school and a private parochial school that a child without such special needs would have.

There are limits to the theoretical guarantee of an equal choice. Section 76.654(a) does not require that special education benefits for private school students be *identical*, but only that they be "*comparable* in quality, scope, and opportunity for participation" to the benefits for public school students. In *Wheeler v. Barrera*, 417 U.S. 402 (1974), the Supreme Court interpreted identical language in a regulation applying to Title I of the Elementary and Secondary Education Act of 1965. *See* 417 U.S. at 407. The Court held:

> [A]lthough it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools. . . . In order to equalize the level and quality of services offered, something must be substituted for the private school children. The alternatives are numerous.

Id. at 424-25. Alternatives mentioned included teacher training institutes, Saturday enrichment courses, media centers, educational summer camps, bookmobiles, etc. *Id.* at 425 n.20.

The analysis of educational comparability in *Wheeler* dealt with an aggregate group of students, for whom different types of services could be equally beneficial. In the present case involving the IDEA, however, the proper focus must be on K.R.'s particular needs. Here, there simply is no "comparable" alternative to in-class services provided by an instructional assistant, and the school corporation does not claim to be offering one. What the school corporation does offer to K.R. as long as she attends St. Mary's School — periodic contact with an instructional assistant at a public site — would not

provide her with the benefit of an instructional assistant at all. Yet the school corporation agrees that if K.R. were to attend public school, it would provide her the benefit of having an instructional assistant in class. Because 34 C.F.R. § 76.654(a) mandates comparable benefits, the school corporation must provide an instructional assistant for K.R. at St. Mary's School.

The School Corporation's Defenses

The school corporation has offered, at different times and in different combinations, three defenses for its refusal to provide an instructional assistant at St. Mary's. First, the school corporation relies on an Indiana regulation that gives it the choice of locations for special education services. Second, the school corporation says K.R. cannot safely attend St. Mary's with an instructional assistant. Third, the school corporation argues that the Indiana Constitution forbids assistance to parochial schools. As explained below, none of these arguments justifies the school corporation's refusal to provide an instructional assistant here.

The court notes initially that the school corporation's various positions during the last two years reflect, at best, considerable confusion. The school corporation even makes the claim that, while it is looking out for K.R.'s best interests, her parents are "callous and cavalier" toward her safety.[5] Based

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[5]The school corporation states in its brief:

> Plaintiffs argue at page 26 of their Brief that the needs of the child and the safety of the child are not relevant to this case. This is indeed a callous and cavalier attitude. Would Plaintiffs

(continued...)

on the record before this court, that assertion is both absurd and offensive. The record shows that K.R.'s parents have nothing but K.R.'s best interests in mind. They have made, and no doubt are prepared to continue to make, great sacrifices to give her an appropriate education despite the school corporation's failure to fulfill its obligations. In contrast, the twists and turns in the school corporation's positions raise serious doubts about its good faith in at least its recent dealings with K.R. and her family.[6] Nevertheless, no matter when or how offered, the school corporation's arguments are not frivolous and deserve discussion.

The Indiana state regulation at issue provides as follows:

> At the election of the public school corporation, special education and related services may be provided at:

(...continued)

> insist that K.R. be taught in a building with no heat or one where pieces of the ceiling kept falling on the students? Apparently, Plaintiffs would say that K.R. could wear her winter coat and a football helmet.

Brief of Defendant in Opposition to Complaint, at 8.

[6]The record does indicate, however, that some school corporation employees have worked hard for K.R.'s benefit in developing her individual educational plan and providing her with many special educational services. The court does not ignore or intend to demean their efforts.

(1) the private school or facility;
(2) the public school; or
(3) a neutral site.

511 Ind. Admin. Code § 7-4-4(c). The school corporation claims that this regulation gives it the discretion to provide instructional assistant services to K.R. at its public school site and not at St. Mary's.

For other services, the discretion provided by this state regulation may very well be consistent with federal law. For example, the benefit private school students would receive from a speech therapy class held once a week at a public school might well be "comparable" to the benefit public school students would receive from the same class. By that reasoning, the school corporation might be able to choose to provide the speech class only at the public school, and not to provide a separate speech class at the private school. In this case, however, the parties agree that K.R. needs an instructional assistant throughout every school day and that the school corporation would meet this need if K.R. were a public school student. Therefore, under the federal regulation, 34 C.F.R. § 76.654(a), the school corporation must provide an instructional assistant for K.R. at St. Mary's, and under the Supremacy Clause, of course, an applicable federal regulation takes precedence over a state regulation where the two directly conflict. *See* U.S. Const. art. VI, cl. 2.

In response to an interrogatory, the school corporation suggested that it would be more expensive to provide an instructional assistant at St. Mary's than at the public school.[7]

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[7]Plaintiffs asked the school corporation to assume the (continued...)

One might imagine a test of comparability that would focus on expense rather than on quality, scope, and access, so that the public school system would have to spend an equal amount of money, but not more, on special services for private school students and public school students. However, § 76.654(a) requires comparability in "quality, scope, and opportunity for participation," without any reference to cost. In fact, 34 C.F.R. § 76.655(b) provides:

> The subgrantee [local school corporation] shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

Under these regulations, the school corporation must provide an instructional assistant at St. Mary's even if the net cost to the school corporation is more than for an instructional assistant at the local public school.

Next, the school corporation's safety argument also does not justify its refusal to provide an instructional assistant at St. Mary's. The school corporation did not even raise any

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(...continued)
instructional assistant would not have to transport K.R. up and down stairs and then asked the school corporation to state any alternative reason for not providing the instructional assistant at St. Mary's. The school corporation responded: "Lack of supervision for an employee of Defendant. An instructional assistant could perform other duties for Defendant if it were at one of the Defendant's sites."

concerns about safety and accessibility until the administrative hearing, long after it had decided not to provide an instructional assistant at St. Mary's. Although it had known for some time that plaintiffs might choose to place K.R. at St. Mary's, it did not actually base its decision on any safety concerns. The school corporation did not send its employees to inspect St. Mary's until after it had made its decision not to provide an instructional assistant there, and after plaintiffs formally requested a hearing to appeal that decision.

Once the school corporation did raise safety as an issue, it assumed the instructional assistant would help K.R. move about at school. Plaintiffs claim in their briefs that M.R. would continue to transport K.R. at school even if a publicly-funded instructional assistant performed other services. However, K.R.'s parents have made the following statements regarding M.R.'s role in providing services:

> [I]t is not in K.R.'s best interest to always have her mother present with her as she attends school. Her social, emotional and academic development are hindered by [M.R.'s] constant presence. . . . [T]he lack of services of an instructional assistant for K.R. places a burden on [M.R.], in providing those services, and on K.R., in that she will not fully develop socially, emotionally and academically independent of her parents.

Affidavits of M.R. and K.R.R., ¶¶ 13-14. Given the expressed goal of eliminating M.R.'s constant presence at K.R.'s school, this court follows the school corporation's assumption that the instructional assistant, rather than M.R., would be responsible for assisting K.R. move about at school, at least most of the time. Therefore, the school corporation might be liable for

negligent actions of the instructional assistant. As noted already, however, extra costs for the school corporation, including potential costs of liability, do not provide a valid basis for the school corporation's decision.

The court assumes that genuine concerns about safety may be relevant in determining whether a school corporation is meeting its obligations under the IDEA and § 76.654(a). But to justify its flat refusal to provide an instructional assistant, the school corporation would need to prove that there would be no reasonably safe way to provide K.R. the services of an instructional assistant at St. Mary's. It has not done so. The evidence the school corporation presented at the administrative hearing to show that K.R. could not safely attend St. Mary's is both vague and scant. In fact, the record shows that K.R. has been attending St. Mary's safely for nearly two years, with her mother acting as an instructional assistant. A safe past does not assure a safe future, but the school corporation's amorphous and *post hoc* concerns for K.R.'s safety do not justify its refusal to comply with 34 C.F.R. § 76.654(a).

Finally, the school corporation has also argued that the Indiana Constitution prohibits public money from going to the benefit of any religious institution. It apparently places some reliance on this argument for it asserted in response to an interrogatory: "The Defendant would not provide a related service of an instructional assistant in a physically accessible private school. . . ."[8] At oral argument, the school corporation claimed that it is never obligated to provide *any* special education services at a private site to a child placed there

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[8]Of course, this contention further undermines the school corporation's reliance on supposed concerns about K.R.'s safety.

voluntarily by her parents. The school corporation admits that it has provided, and is currently providing, special education services at several private parochial schools, including St. Mary's. But the fact that the school corporation has been providing these benefits does not mean that the practice either is or is not constitutional. Again, the school corporation has asked for a decision on this issue, so the court must address it regardless of the school corporation's inconsistency or strategy in making the argument.

The school corporation could not argue, with any hope of success, that it would violate the federal Establishment Clause by providing an instructional assistant at St. Mary's for K.R. *See Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, 113 S.Ct. 2462 (1993) (holding a public school district did not violate the Establishment Clause in providing an interpreter under the IDEA to a deaf student in a Catholic school). Instead, the school corporation raises the separate possibility of violating a clause of the Indiana Constitution, which provides: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. art. I, § 6. The school corporation cites for support a case in which a public trustee responsible for providing emergency food and shelter to the homeless had reimbursed private religious missions that required guests to attend religious services. The Indiana Court of Appeals held that the public trustee violated Article I, Section 6. *Center Township of Marion County v. Coe*, 572 N.E.2d 1350, 1360 (Ind. App. 1991).

St. Mary's requires its students to attend religious services, but the school corporation is not being asked to pay St. Mary's directly to provide religious or general educational services. Instead, the school corporation is supposed to provide an individual disabled student with special services, no matter what school she attends. The Supreme Court of the United

States has held already that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA," and "under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, ___ U.S. at ___, 113 S.Ct. at 2469, 2468.[9] The school corporation has not shown that Article I, Section 6 of the Indiana Constitution imposes a more stringent standard or requires a different result than the federal Establishment Clause as applied in *Zobrest*. Therefore, the school corporation would not be violating Article I, Section 6 of the Indiana Constitution by providing IDEA services at a private, religious school. *See also Felter v. Cape Girardeau Sch. Dist.*, 810 F. Supp. 1062, 1068-70 (E.D. Mo. 1993) (public school district would not violate Missouri Constitution by providing specially needed transportation service to private school student under IDEA).[10]

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[9]"The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition — and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA [service], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot." *Id.* at 2468.

[10]Even if Article I, Section 6 prohibited the school corporation from providing K.R. an instructional assistant at St. Mary's partially with state funds, the federal Department of Education would be required to provide K.R. the same service with exclusively federal funds. The IDEA states that if a school corporation would violate state law by providing IDEA services to a student placed in a private school, then the U.S. Secretary of Education shall implement a "by-pass" to waive the troublesome requirement for the state. 20 U.S.C. (continued...)

Conclusion

Plaintiffs' request for declaratory and injunctive relief is granted. The IDEA and related regulations require the Anderson Community School Corporation to provide the services of an instructional assistant to K.R. at St. Mary's School. Because plaintiffs are entitled to relief under the IDEA, this court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would independently require the same result. The court will enter a permanent injunction ordering the Anderson Community School Corporation to comply with its obligations. The court will enter final judgment separately. Plaintiffs shall submit a petition for attorneys fees and costs pursuant to 20 U.S.C. § 1415(e)(4) and 42 U.S.C. § 1988 within the fourteen days provided by Fed. R. Civ. P. 54(d)(2).

So ordered.

Date: May 25, 1995

/s/
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

(...continued)
§ 1413(d); 34 C.F.R. §§ 300.480 - 300.481. After a by-pass, the Secretary of Education is responsible for arranging the federally-required services to be provided for the particular child. 20 U.S.C. § 1413(d) (for students placed in private schools by public school corporations); 34 C.F.R. § 300.481 (for all students in private schools)..

INDIANA CODE §20-1-6-4

Sec. 4. The state of Indiana hereby accepts all of the provisions and benefits of all laws enacted by the Congress of the United States which provide for aid to children with disabilities, and the Indiana state board of education is hereby designated as the proper authority and is authorized toaccept any federal funds appropriated for the purpose of aiding in the education children wit disabilities and the Indiana state board of education shall comply with all the requirements of federal law concerning any such federal funds relating to such special educational activities as well as with any amendments thereto or rules and regulations issued thereunder and in conformity therewith, and not inconsistent with the provisions of this chapter. *As amended by P.L. 2-1988, SEC.431; P.L. 23-1993, SEC.85.*

INDIANA DEPARTMENT OF EDUCATION
ARTICLE 7
HEARING DECISION
HEARING NO: 712-93

The purpose of this Hearing was to gather evidence and to hear testimony in preparation for rendering a decision regarding educational matters found in a petition submitted by the student's parents. They requested a hearing in a letter dated August 26, 1993 that was sent to the Indiana Department of Education, where it was received on September 1, 1993. The parents stated that the reasons that we are requesting a hearing is the refusal of the Anderson Community School Corporation to provide our daughter with the related service of an Instructional Assistant at [name of school]".

A prehearing conference was convened by the Hearing Officer on September 28, 1993, with attendance by the student's father, counsel from Indiana Protection and Advocacy Services representing the petitioner, counsel for the School Corporation, and the Director of Special Education and Assistant Director of Special Education for the School Corporation. At the conference, the parent requested that the Hearing be closed to the public and that witnesses be separated, which were granted. The following issue was delineated for the Hearing:

> whether the school corporation should provide an instructional assistant at the private parochial school

Prior to the Hearing, Counsel for the Petitioner submitted a Request for Preliminary Order to the Hearing Officer, asking that he order the school to maintain the current related services as provided in the child's

Individualized Education Program (IEP). There was concern that the school was considering not providing these services while the Hearing was in progress. At the prehearing conference, Counsel for the Petitioner also asked that an issue be added regarding whether the school corporation should reimburse the parents for expenses (primarily mileage for transporting the child to the public school site for related services) for the 1992-93 school year and part of the 1993-94 year to that point. The school corporation agreed to continue providing the related services and to reimburse the mileage expenses as requested by the parents. Consequently, these concerns were resolved and were not added as issues in the Hearing.

The school corporation requested an extension of time past the date of October 16, 1993, which was granted to December 3, 1993. The parties exchanged exhibits and witness lists before October 20, 1993, as per the five-day rule. The Hearing was convened on October 26, 1993, at the Administrative Offices of the school corporation. It was determined that all due process procedures had been followed correctly prior to the Hearing. A brief prehearing conference was held prior to the beginning of testimony to clarify questions. The hearing proper commenced at about 8:40 a.m., and all exhibits were admitted as presented by the parties. Petitioner's exhibits were labeled as "P-l", "P-2", etc., and the Respondent's exhibits were labeled as "R-l", "R-2n, etc. Counsel for the Petitioner questioned the school corporation's use of a written summary of a court case, as opposed to having the actual text. Counsel for the School Corporation agreed to refer to the case in oral comments. Later in the testimony, a witness referred to some material that described an orthopedic device. The document was included as a new exhibit for the Petitioner and was labeled

"P-23", with agreement by the school. The School Corporation also included copies of portions of Article 7 and the Indiana Constitution as controlling authority, and a copy of *Goodall by Goodall v. Stafford County School Bd.* from the 930 Federal Reporter.

The Hearing was closed to the public, and witnesses were instructed not to discuss their testimony or that of others until the Hearing was completed. In attendance were the Hearing Officer, Counsels for the Petitioner and the School Corporation, the Director of Special Education, the parents, and an observer from Indiana Protection and Advocacy Services. The Hearing was called to order at about 8:40 a.m., with opening statements made by representatives of the parties. The Hearing was adjourned at about 3:30 p.m.

FINDINGS OF FACT

After careful consideration of the testimony and written evidence presented during the Hearing, the following FINDINGS OF FACT were found to be pertinent to the issues:

1. The student is a six-year-old girl who has been determined to have multiple handicaps and is eligible for special education services. The child's handicaps include motor and expressive language difficulties, and she has received diagnoses of myelomeningocele, spina bifida, and hydrocephalus with a shunt. She is non-ambulatory and needs considerable assistance with positioning for activities, self-help skills, and motor movements.

2. Evidence and testimony indicate that the parties agree that the child is appropriately identified as multiply handicapped and is eligible for related services of physical therapy (PT), occupational therapy (OT), and speech-language therapy (SLT).

3. The child currently is enrolled in a private parochial school at the election of the parents, where she attends a regular kindergarten classroom. The parties agree that the student needs an instructional assistant to receive full benefit of her educational program, but disagree as to where the service is to be provided.

4. Testimony indicated that the Petitioner contends the school has the obligation to provide the assistant at the private school site, while the school corporation maintains that they have the right to select where the services will be provided. In this case, the school proposed to provide the services at a local elementary school.

5. Evidence and testimony indicated that three case conferences were held in April, July, and August of 1993 to develop an IEP for the child and to resolve the issue of the instructional assistant while she attends the parochial school. Although the content of the IEP was agreed to by the parties, the school refused to provide the assistant at the private school, and the parents wished to keep the child enrolled there. The private school is unwilling to assume the expenses for the assistant.

6. Evidence and testimony indicated that the student has significant mobility limitations and must be carried or transported in a stroller or other device. At present, her mother serves as the instructional assistant for her daughter in the classroom.

7. Evidence and testimony indicated that the private school has several steps and three floors, and no ramps or elevators that render it accessible to wheelchairs or similar modes of transportation. The restrooms are not adapted for the handicapped, and the student must eat in the principal's office, because of accessibility problems with the cafeteria.

There are no immediate plans to make the school accessible for the handicapped, although the topic has been discussed.

8. Evidence and testimony indicated that the school corporation has three elementary schools that are accessible to the handicapped, are on one floor, and any one of them could be the child's school of attendance. The public schools also have restroom and eating facilities that have been adapted for the handicapped, and the child would have full access to all school rooms, services, and facilities. Restroom facilities are adapted for the handicapped. At some point, the child will need to be catheterized, which is a medical decision (Transcript, p. 57).

9. Testimony by the school corporation's physical and occupational therapists indicate that the student has low muscle tone and needs help with gross and fine motor movement and positioning for some tasks and activities. The physical therapist indicated that she would prefer that the student begin the use of an adaptive wheelchair within the near future, and the use of prone standers is not feasible. The therapist has concerns about the child's safety in the private school, because as she is transported up and down stairs by an assistant, there is in some danger of injury if the assistant would fall. Because the student has motor limitations, there is concern that she would not be able to use her hands and arms to "break her fall", as would most children her age. The concern is of additional importance, given that the child has a cerebral shunt, and a head injury could have even more negative consequences. Parents and school personnel feel that the risk of injury to the child is minimal.

10. Testimony indicated that the school is concerned about the safety of the child, as well as potential legal liability for injuries that might occur to the child or assistant, should there be an accident. School personnel also expressed

some concern about being able to adequately supervise and monitor the assistant if the supervisors are not on site on a regular basis, although on-site supervision is not required in Article 7.

11. Testimony indicated that the assistant would be a public school employee and be under the supervision of the school, although s/he necessarily would interact with parochial school staff and teachers. Private school personnel are approving of this arrangement, but the principal wanted it made clear to the assistant that no comments or actions would be permitted that would be contradictory to the religious mission of the school. The principal did not know if the school would assume liability under their insurance program if an injury to the child or assistant would occur.

12. Testimony from the classroom teacher indicated that the assistant would be working directly with the child at least 50% of the time, and probably more, but she would not expect the assistant to help her with other duties while not assisting the child.

13. Testimony from the Director of Special Education indicated that she feels the school can provide a better and free appropriate public education (FAPE) to the student if she attended the public schools. It was her testimony that the school can provide barrier-free access to programs and facilities, there is increased socialization that does not occur at the private school, and the overall quality and services of the special education program are more appropriate for the student's needs than are those of the parochial school. She also expressed concern about the safety of the child while being transported up and down stairs, exit during emergencies, and liability of the school. It is the position of the school that Article 7 permits the school to elect where

they will provide services under 511 IAC 7-4-4(c)(1), and they elect to provide it at a local school site.

CONCLUSIONS OF LAW

After careful and complete consideration of all testimony and written evidence, and having undertaken review of the FINDINGS OF FACT in this matter and the identified issue, the following CONCLUSIONS OF LAW are presented.

Issue: **Whether the school corporation should provide an instructional assistant at the private parochial school**

The evidence and testimony presented during the Hearing focused on the school exercising its option under Article 7 511 IAC 7-4-4(c)(1) about where to provide special education services with regard to an instructional assistant. The school corporation maintains that it can provide a FAPE better in a public school building, where issues of safety, socialization of the student, quality of services, and accessibility can be addressed. There is no disagreement that the child needs the help of an instructional assistant, but where that assistant will provide help is the central issue. In considering the issue in this Hearing, the Hearing Officer considered several factors, including: (l) the wishes of the parent for their child to receive an education at the private school, (2) the school's obligations and options under Article 7 and the Individuals with Disabilities Education Act (IDEA), (3) the needs of the child, (4) issues of safety for the child, (5) accessibility, and (6) and a FAPE/least restrictive environment for the child, as per Article 7 and the IDEA. The best interests of the child must be considered simultaneously with the requirements of federal and state law. In this case, the parents have chosen unilaterally to place the child in a private parochial school. The school's

position to elect where to offer special education is within its option if it is not done for administrative convenience or there effectively is denial of services for which the student is eligible. There is no evidence that the school is attempting to abdicate its responsibility, and, in fact, can provide a barrier free environment that is wheelchair accessible, which the child likely will utilize soon. The possibility of injury to the child or assistant and exit in case of emergency cannot be-dismissed without appropriate consideration. The Petitioner maintains that the school cannot deny services to the child under federal regulations, even though state regulations may contain language allowing a school the option of where to provide related services. There is no requirement in federal or state regulations that a school must provide special education services in a private school where parents elect to enroll their child if a FAPE is available within the jurisdiction of the local education agency. It is the Hearing Officer's conclusion that a FAPE cannot be provided in the private school for the child, given current circumstances. Further, because the school is not refusing to provide the related service of an instructional assistant that would constitute a FAPE, they are permitted to exercise their option of where to provide these services. Thus, there is no evidence that the school's election to provide services at the school discriminates against the child or would result in the child being denied access to a FAPE. The evidence and testimony indicate that, at present, a FAPE can be better provided at the local public school. Therefore, the school is not obligated to provide the instructional assistant at the private school.

SPECIFIC ORDERS

Because the Hearing Officer has found in favor of the school's position, there are no Specific Orders, other than the school is ordered to continue providing the related services

of OT, PT, SLT, and transportation as per the IEP without interruption, assuming the parents wish to continue the services. The services are to be provided at the parents' option, even if they choose not to place the child in the public school.

All Parties to this Hearing have the right to appeal this decision by filing a Petition for Review with the Board of Special Education Appeals through the Division of Special Education within thirty (30) calendar days from the date of receipt of this decision.

Thomas J. Huberty, Ph.D.
Independent Hearing Officer
December 2, 1993

Before the Indiana
Board of Special Education Appeals

Hearing No. 712-93

Student:	Kayleigh Rudynski
Student's Parents:	Mr. and Mrs. Kevin Rudynski
Parent's Representative:	Dana L. Long, Esq.
School Corporation:	Anderson Community Schools
School's Representative:	David Gotshall, Esq.
Appeal Date:	March 11, 1994

Independent Hearing Officer: Thomas Huberty, Ph.D.

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS
ARTICLE 7 HEARING NO. 712-93

The Board of Special Education Appeals received oral argument from the parties on March 11, 1994 in response to a Petition for Review submitted by the parents of the child (daughter) which was received in the Department of Education on January 28, 1994. The other party in the original hearing was the Anderson Community School Corporation. The hearing was held on October 26, 1993. The decision of the Independent Hearing Officer (IHO) was rendered on December 2, 1993.

The hearing centered on the single issue of whether the school corporation should provide an instructional assistant for the student at the private parochial school. Since both parties were in agreement as to the need for services and the school had agreed to pay for related services and mileage for transporting the child to the related services, the only issue was "where" the instructional assistant was to provide the instructional support. In summary, the IHO's Findings of Fact established that the student was six years old, multiply handicapped, and eligible for special education services, including physical therapy, occupational therapy, and speech language therapy. She is non-ambulatory and has a need for considerable assistance with positioning for activities, self-help skills, and motor movements. currently the student is enrolled in a private parochial school at the election of the parents. The private school is largely inaccessible to the student. Although both parties agreed that an instructional assistant is needed for the student to receive full benefits from the educational program, there was disagreement as to where the services are to be provided.

The parents maintained the school is obligated to provide the services at the parochial school site, whereas the school maintained they have the right to select the site where services are to be provided. Thus, the school is proposing delivering the services at a local public elementary school.

APPEAL

The parent's Petition for Review was received by the Indiana Department of Education on January 28, 1994. The parents maintained that the IHO's decision was contrary to law in that it ignored federal law that requires provision of special education and related services to meet the needs of a private school student, and violates the student's right to attend a private school of choice. The Petitioner contended that the IHO's decision allowed state law to take precedence over federal law. Further, they objected to the decision in that the IHO considered liability concerns to be the overriding consideration as opposed to the educational needs of the child. In addition, the Petitioners maintained that the IHO's decision is arbitrary and capricious, is unsupported by the evidence, and was reached in violation of established procedure. Finally, the Petitioners maintained that the IHO exceeded his jurisdiction.

The School's response to the petition was received by the Indiana Department of Education on February 16, 1994. The school disagreed with all of the objections raised by the Petitioner and asked for the IHO's decision to be upheld.

The following is a summary of petitions, responses to petitions, motions, and Board actions.

1. Petitioner's (parents) Request for Extension of Time to prepare a Petition for Review was received by the

Indiana Department of Education on December 9. 1993.

2. The Indiana Board of Special Education Appeals granted the Petitioner's Request for Extension of Time on December 10, 1993, giving Petitioner's until February 2, 1994, to file a Petition for Review.

3. The parents' Petition for Review was received by the Indiana Department of Education on January 28, 1994.

4. The School's Request for Extension of Time to Respond was received by fax by the Indiana Department of Education on February 4, 1994, followed by hard copy received on February 7, 1994.

5. The Indiana Board of Special Education Appeals granted the School's Motion for Extension of Time on February 7, 1994, giving the School until February 17, 1994, to prepare a response.

6. The School's Response to the Petition for Review was received by the Indiana Department of Education on February 16, 1994.

7. The Board of Special Education Appeals, by letter dated February 25, 1994, and following consultation with the representatives for the parties, notified all parties that the Appeal would be held at 9:30 a.m. on March 11, 1994 at the Administration Building of the Anderson Community Schools in Anderson, Indiana.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board of Special Education Appeals is the entity of the state duly empowered to review the Findings of Fact, Conclusions of Law, and Orders of the Independent Hearing Officer appointed under the provisions of 511 IAC 7-3 through 7-16 ("Article 7"). The Board of Special Education Appeals has jurisdiction in this matter.

2. The parties were afforded due process rights. both parties were able to present their evidence through witnesses, were able to conduct examination and cross examination, and stated their positions clearly. There is no evidence that the IHO violated any due process procedures.

3. All Findings of Fact made by the IHO are clearly substantiated by the record. There is no evidence in the record that the IHO was arbitrary or capricious in considering the evidence and in rendering his decision.

4. the IHO's Findings of Fact support his Conclusions of Law.

5. The IHO's Conclusions of Law support his decision to not issue orders.

FINAL ORDERS

1. Any Finding of Fact which may be considered a Conclusion of Law shall be considered a Conclusion

of Law. Any Conclusion of Law which maybe considered a Finding of Fact shall be considered a Finding of Fact.

2. The Board upholds the decision of the IHO. Motion carried unanimously.

3. Any and all other motions before the Board not specifically addressed herein are hereby denied.

Any party to the matter may seek judicial review of the Board's decision in a civil court with jurisdiction within thirty (30) calendar days from the date of this written decision.

Date: April 7, 1994

Raymond W. Quist, Chair
Indiana Board of Special
Education Appeals

Supreme Court, U.S.
FILED
FEB 24
CLERK

No. 97-960

In The

Supreme Court of the United States

October Term, 1997

K.R., AN INFANT BY HER PARENTS
AND NEXT FRIENDS M.R.
AND K.R.R., AND M.R. AND K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

Whether 20 U.S.C. Secs. 1400 et seq. (IDEA) and the IDEA Amendment Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997) require Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, with an instructional assistant on the site of a private parochial school where K.R.'s parents have voluntarily chosen to enroll her when K.R. is virtually wheelchair bound and the private parochial school is not handicapped accessible.

Petitioners raise a second issue contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment. Respondent objects to the presentation of this issue as it was raised for the first time in Petitioners' original Petition before this Court.

Whether Petitioners have standing to bring suit in light of the IDEA Amendment Act of 1997.

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JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The same Court's order denying Rehearing was entered on May 28, 1996. On August 26, 1996, Petitioner filed a Petition for Certiorari. On June 27, 1997, the Supreme Court of the United States granted certiorari and remanded the cause to the Seventh Circuit Court of Appeals for further consideration in light of the IDEA Amendment Act of 1997. The Seventh Circuit Court of Appeals again ruled on September 10, 1997 and Petitioner again seeks certiorari. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254. The District Court jurisdiction was based on 20 U.S.C. Sec. 1415(e) and 28 U.S.C. Sec. 1331.

STATUTORY AND REGULATORY PROVISIONS

The relevant Federal statutes in this cause are 20 U.S.C. Sec. 1400 et seq., Individuals with Disabilities Education Act (IDEA), and the IDEA Amendment Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997), Federal regulations involved include 34 C.F.R. Sec. 300.403, 450-460, 506-511, 552; 34 C.F.R. Secs. 660-663 and the proposed regulations Sec. 300.454 through 300.457, Indiana Statute, IC 20.1.6.4.

STATEMENT OF THE CASE

Respondent will follow generally the format adopted by Petitioner.

A. Statutory and Regulatory Scheme: Part B of IDEA provides for Federal grants to be made through the state (SEA) to local education agencies (LEA) to assist in funding educational services for students with disabilities. As required by 20 U.S.C. Sec. 1412, Indiana has agreed to accept the provisions of IDEA. IC 20-1-6-4. Regulations have been adopted pursuant to 20 U.S.C. Sec. 1417.

A state which accepts the benefits of IDEA must have in effect a policy which assures all children with disabilities the right to a free appropriate public education (FAPE) and a plan assuring such an education is available. 20 U.S.C. Sec. 1412(1) and (2)(B). Each child identified as being disabled as defined by IDEA and regulations must be provided an individual education plan (IEP) that identifies the special education and related services necessary to meet the child's needs and must offer to provide those services at public expense. 20 U.S.C. Secs. 1412(4), 1414(a)(5).

Respondent adopts the Seventh Circuit's statement of the facts found on pp. 2-3 of its original decision and which read as follows:

> It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from

myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-94 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that

it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the District Court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the District Court. On May 25, 1995, the District Court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. *K.R. ex rel. M.R. v. Anderson Community Sch. Corp.*, 887 F. Supp. 1217 (S.D. Ind. 1995). The District Court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

In addition, Respondent would note that St. Mary's school is not wheelchair accessible. (Hearing officer's decision-finding of facts nos. 7 and 8 found at pp. A-51 to A-52 in the appendix to Petitioners' Petition). The school corporation has accessible facilities for wheelchair bound students.

The Seventh Circuit Court of Appeals overturned the District Court ruling on April 12, 1996. The Seventh Circuit held at page 11-12 of its decision (A-17, A-18 of Petitioner's appendix):

> We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the District Court is therefore reversed.

Petitioners filed a Petition for Rehearing which was denied on May 28, 1996.

Petitioners filed a Petition for Certiorari on August 26, 1996. On June 27, 1997, the Supreme Court of the United States granted certiorari and remanded this case, along with other cases from other circuits pending which dealt with similar issues, for further consideration in light of the IDEA Amendments of 1997.

On September 10, 1997, the Seventh Circuit Court of Appeals again reversed the district court holding that the

clarifications provided in the amendments further support its original decision. The Court also denied Petitioners' new contention that Respondent's actions violated the First Amendment.

SUMMARY OF ARGUMENT

1. Under IDEA, its regulations, the IDEA Amendment Act of 1997, and the proposed regulations thereto, the decision of the Seventh Circuit Court of Appeals was correct. Both the statute, in its original form and as amended, and the accompanying regulations (plus the proposed regulations) provide that a public school district is not required to provide related services at the private school site when the child's parents have voluntarily placed the child at the private school.

The decision of the Seventh Circuit is not in substantial conflict with the Tenth Circuit's decision as far as the prospective application of IDEA as amended.

2. The second argument made by Petitioners is that Respondent's conduct constitutes a violation of the neutrality principle under the establishment clause of the First Amendment.

Respondent objects to any consideration of this issue because it was not raised originally in this matter. It was raised for the first time in Petitioners' prior Petition for Certiorari. In any case, Respondent's actions do not constitute a violation of the First Amendment's neutrality requirement.

3. Petitioner no longer has standing to bring suit because IDEA, as amended, clarifies that no private school student has an individual right to receive special education or related services and that the due process provisions of IDEA are not applicable in such an instance.

ARGUMENT

1. Petitioners first argue that the Seventh Circuit's decision conflicts with *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993). That case dealt only with the constitutionality of providing a sign language interpreter at a parochial school. The Court specifically refused to address the statutory and regulatory arguments. See 113 S. Ct. at 2465-2466. The language from *Zobrest* cited by Petitioner at p. 10 of its brief is in support of the proposition that providing a sign language interpreter on-site at the parochial school is a neutral service and therefore not a violation of the Establishment Clause. In no way can the language cited from *Zobrest* be interpreted as holding that IDEA *mandates* providing an instructional assistant on-site.

The proposed regulations to the IDEA as amended recognize the permissive (but not mandatory) basis of *Zobrest* where in Sec. 300.456(a) it is provided that services *may* be provided on-site at the private school to the extent consistent with law. A note to the section specifically references *Zobrest*. However, the regulation is clearly permissive and not mandatory. Nothing in the

Seventh Circuit's decisions would prohibit providing services on-site at a private school. It is therefore not in conflict with *Zobrest*.

Petitioners argue that the Seventh Circuit's decision is not well founded because of its reliance on *Goodall v. Stafford County Schl. Bd.*, 930 F.2d 363 (4th Cir. 1991) which was decided before *Zobrest*. However, *Goodall* was revisited by the Fourth Circuit in 1995 wherein the Court stated:

> "[W]e note that in *Goodall I*, we held that the Individuals with Disabilities Education Act (IDEA) . . . did not dictate that Stafford County must provide or pay for the services requested by the Goodalls in Mathew's Christian School. 930 F.2d at 369. That portion of our opinion was not overruled by *Zobrest*. . . . and cannot be challenged in the instant appeal." *Goodall by Goodall v. Stafford County Schl. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995)

Petitioners next argue that the Seventh Circuit is wrong when it holds that IDEA provides lesser rights for children who are voluntarily placed by their parents in private schools. Not only was the Seventh Circuit correct in its holding of a lesser right but in fact the amendments make clear that such a child has no individual right to services. Proposed regulation Sec. 300.454(a) provides that, "No private school child with a disability has an individual right to receive some or all of the special education and related services that a child would receive if enrolled in a public school." Sec. 300.455 requires provision of "comparable services" but defines that comparable in quality does not require the same amount of

service for private school children and does not require that any particular child receive service. Sec. 300.457 provides that private school students are not entitled to the due process provisions of the Act.

Petitioners argue that since the public school must create an IEP for all students that it therefore follows that the services must be provided. The purpose of the act is not to insure a free *private* education only a free *public* education. The public school must insure that all eligible children are identified and provided an IEP. If the parents then place the child in a private school then the public school is not required to pay for it as long as a free appropriate public education is available. Sec. 101 of the IDEA Amendments Act, amending Sec. 612(a)(10) of IDEA provides that the law

> " . . . does not require a local educational agency to pay for the cost of education, including special education *and related services*, of a child with a disability at private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 111 Stat. 63 (emphasis added).

Petitioners argue that this is in conflict with Sec. 612(a)(18)(C). This is not so. That proviso in no way mandates use of local dollars for private school students. It is not even applicable if a free appropriate public education is available. Petitioners are trying to create a right to a free *private* education but Section 101 of the Amendments makes clear that is not the purpose of the Act.

Petitioners contend that *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. 2481, 2485 (1994) supports their position. This contention is incorrect. First, as Justice Scalia notes in his dissent:

> Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students." 114 S. Ct. at 2506.

Secondly, the quoted language is mere dictum. Thirdly, the quoted language speaks of "handicapped children" generally and in the plural, not each handicapped child individually. Respondent agrees that handicapped, private school children as a class have certain rights to some services under IDEA. However, *Kiryas Joel* does not hold that a voluntarily placed private school student has an individual right to services and the Seventh Circuit's decision is not in conflict with *Kiryas Joel*. As noted previously, the Amendments clarify that a private school student has no individual right under IDEA.

Petitioners next argue that the Court's decision changes the definition of "comparable benefits." They cite *Wheeler v. Barerra*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974) in support of their argument. *Wheeler* dealt with Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241 et seq. which has some regulations which are similar to IDEA. *Wheeler* does not support Petitioners' contentions. The Court in *Wheeler* stated:

> "Inasmuch as comparable, and not identical services are required, the mere fact that public school children are provided on-the-premises Title 1 instruction does not necessarily create an obligation to make identical provision for private school children." 417 U.S. at 421-422.

The *Wheeler* Court recognizes the same need for flexibility and discretion as the Court herein recognizes under IDEA. Like IDEA, Title I creates no individual student rights to specific services.

In addition, there are important differences between Title I and IDEA. IDEA clearly distinguishes between public school students and voluntarily placed private school students while Title I regulations "draw no distinction between public and nonpublic school children." *Wheeler, supra,* 417 U.S. at 406 n.2. Title I deals solely with a federally funded program and the allocation of those funds, while IDEA creates obligations for the public school while financing only eight percent of the cost of those obligations. Under IDEA, the *federal* funds may need to be expended on a comparable basis but not the ninety-two percent provided by state and local sources. *Wheeler* provides no support for Petitioners. To the contrary, it provides support for the Seventh Circuit's decision.

The proposed regulations further support the Seventh Circuit decision. Sec. 300.455(c) states:

> "As used in this section, comparable in quality –
>
> (1) Means that services provided private school children with disabilities must be provided by similarly qualified personnel;

> (2) Does not require the same amount of service for private school children with disabilities as for children with disabilities in public schools; and
>
> (3) Does not require that any particular child receive service or receive the same amount of service the child would receive in a public school."

Petitioners next contend that the decision of the Seventh Circuit is in direct conflict with *Fowler v. Unified School Dist. No. 259,* 128 F.3d 1431 (10th Cir. 1997). Respondent disagrees as to the prospective effect of IDEA as amended. *Fowler* would appear to be in conflict with the Seventh Circuit as to the effect of the Act prior to being amended since the amendments were not specifically made retroactive. However, since this application would be so limited it does not merit consideration by this Court on that basis.

Further, the Tenth Circuit was incorrect in determining that the amendments were not intended to simply clarify the law in this area. As the Fifth Circuit noted in *Cefalu v. East Baton Rouge Parish School Bd.,* 117 F.3d 231, 232-233:

> " . . . Congress recognized the difficulty arising from judicial efforts to interpret the IDEA and enacted *clarifying* amendments in order to 'resolve . . . the subject of an increasing amount of litigation in the last few years.' S. Rep. No. 17, 105th Cong., 1st Sess. 13 (1997). These amendments specifically state that an agency is required only to provide students voluntarily enrolled in private schools with a proportionate share of federal funds under the IDEA and is

> not required to pay for the cost of special education services. See IDEA Amendments Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997) at Sec. 612(a)(10)." (emphasis in original)

Clearly, the amendments were intended to clarify the Act. Additionally, the decision in *Fowler* was based, in part, on the interpretation of state law which is not an issue in this case. *Fowler* is therefore not on all fours with this case. *Cefalu, supra,* is on all fours with this case and is in accord with the Seventh Circuit.

The only issue on prospective application which might arguably be involved is "whether an equal share of the Federal funds must be allocated for *each* disabled child enrolled in a private school, or whether the proportionate amount be allocated for disabled private schools *collectively.*" *Fowler, supra,* 128 F.3d at 1437. (emphasis in original) This issue is not present in the case at bar as Petitioners have never contended that a proportionate share of Federal funds has not been allocated. Respondent has continued to provide K.R. with speech therapy, occupational therapy and physical therapy at a public school site. *Fowler* made no determination on this issue but remanded the case to the district court to decide.

In any case, the proposed regulations deal with this issue. Sec. 300.455(c) in defining services which are comparable in quality, provides that comparable does not require that any particular private school student receive service or receive the same amount of service as a public school student.

2. Petitioners argue that the conduct of the Anderson Community School Corporation in denying K.R. an

instructional assistant on-site at the private parochial school violates the neutrality principle of the Establishment Clause of the First Amendment.

Respondent objects to Petitioners raising this issue. Petitioners did not raise this issue in the State administrative proceedings or the District Court.

In any case, there is simply no basis for such an argument. If Anderson Community Schools were hostile to religion as alleged, it would not have provided the occupational therapy, physical therapy and speech therapy which it has provided to K.R. Anderson's decision not to provide an instructional assistant on-site was based in part on its belief that the State and Federal laws and regulations gave it the option as to where such services would be provided. Anderson's decision was also based on its belief that St. Mary's was unsafe for K.R., was not the least restrictive environment and was therefore not an appropriate placement. These reasons for rejecting an on-site instructional assistant would apply equally whether the private school were parochial, atheist or non-denominational. There is absolutely no evidence in the record to indicate that Anderson Community Schools are hostile toward religion.

3. Under IDEA as amended, Petitioners no longer have standing to bring this suit. Sec. 300.454(a) 62 Fed. Reg. 55026 (1997) of the proposed regulations provides that no private school child with a disability has an individual right to special education or related services. Sec. 300.457(a) of the proposed regulations provides that

the due process procedures do not apply to private school children.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 10 1998
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(3)

No. 97-960

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

K.R. an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent,

On Petition For Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

---

Petitioner's Reply Memorandum

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Petitioner's Reply Memorandum

The Respondent, Anderson Community School Corporation, in its opposing brief in 97-960, raises several points which Petitioners feel require a reply:

I. Anderson Community School Corporation misconstrues Petitioners' Petition regarding the case of Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (U.S. 1993), in particular, Petitioners reference at page 10 of its brief, to Zobrest at 2467:

> "By according parents freedom to select a school of their choice, the statute ensures that a government paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."

Respondent misconstrues the intent of Petitioner, at pages 7 and 8 of it's Brief in Opposition, by indicating Petitioner believes this case mandates providing an instructional assistant on-site. Zobrest, Petitioner agrees, stands for the proposition that providing a sign language interpreter on site at a parochial school is a neutral service and therefore not a violation of the Establishment Clause. However, Zobrest, at 2467, also supports the proposition that parents have choice, and the decision of the Seventh Circuit Court of Appeals is in conflict with that, and so are the 1997 Amendments.

Respondents refer to proposed regulation 34 C.F.R. 300.454 (a) that states:

> "No private school child with a disability has an individual right to receive some or all of the special education and related services that a child would receive if enrolled in a public school."

Respondent, at pages 8-9 of its Brief in Opposition would have us accept this on its face, yet this language does not appear, nor does the intent of this language appear, in Section 612 (a)(10)(A) of the 1997 Amendments and from which section the proposed regulation proposes to derive its statutory authority. Petitioners have discussed this thoroughly in their Petition for Certiorari at pages 11 through 15, and will not discuss it further here. Petitioner would add that in Fowler v. Unified School Dist. No. 259 128 F.3d 1431(10th Cir. 1997), at 1438, at footnote 5, further bear out the ambiguity of the 1997 Amendments on this question:

> "On the one hand, one could agree there is no point to specifying that the child-find requirements apply to private school children, if there is no intent to provide some level of service to each such child..."

Further in Fowler at 1438, footnote 5:

> "On the other hand, the Act appears to address all private school students, and does not evidently contemplate that some voluntarily placed private school students will receive no services."

Consequently the proposition by Respondents, at page 9 of their Brief in Opposition, that Respondents are wanting to insure a free private education is simply not true.

Respondents, at page 9 and 10 of their Brief in Opposition, further argue that Petitioners are trying to create a right to a free private education, by arguing that the non-supplanting language of the 1997 Amendments §612 (a)(18)(C) is not applicable. Respondent erroneously argues that this section does not require the use of local dollars. Yet, all students qualifying for special education services are to receive local dollars. Respondents, and the 1997 Amendments, want to limit that to only those students in public schools. Yet, this was never the intent under IDEA, nor was it when the State of Indiana agreed to accept the program under I.C.20-1-6-4. Respondents try to further their position on this, at page 11 of their Brief in Opposition by arguing IDEA creates obligations for the public school, while financing only eight (8) percent of the cost. Petitioners believe this question of cost is the real issue in this case. Following the reasoning of Respondents, it seems it is easier for the schools to penalize students by refusing service, rather than refuse participation in a program that they believe is inadequately funded. The school seems to care more about money than it does the handicapped children needing services in it's district. If the Federal funding is below the requisite level needed to carry out an appropriate program for handicapped children, why does the state and Anderson Community Schools continue to participate. It is not mandatory, but it would require having to give up the eight (8) percent funding received from the Federal Government.

Finally, Respondents refer to the proposed regulation 34 C.F.R. 300.455(c), regarding the meaning of "comparable benefits", and that this proposed regulation supports the decision of the Seventh Circuit. (Resp. Brief in Opp. pp 13-14). Yet, Respondents offer no answer for the conflict between this proposed regulation and EDGAR regulation 34 C.F.R. 76.654(a) regarding the meaning of comparable benefits. It is important for the Supreme Court to determine the meaning of comparable benefits in relation to handicapped students in private schools, if litigation of this issue is to be eliminated.

II. Anderson Community School Corporation, in its opposing brief in 97-960, objects to the issue raised by Petitioners contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment, on the grounds it is just now being raised for the first time before this Court. (Brief in Opp. pp. 13-14)

Petitioners would show the Court that this issue was previously raised and is clearly in the record below.

Petitioner's complaint, filed in the District Court on May 6, 1994, contains a Preliminary Statement which states in part:

> "Defendant's action in refusing to provide necessary special education and related services violates 20 U.S.C. Sections 1401 et seq. and the regulations promulgated thereunder and infringes on Plaintiffs' free exercise of religion rights secured by the First Amendment..."(Ct. of Appeals Rec. p. 5)

The Complaint at rhetorical paragraph 14 states:

> "The defendant's refusal to extend to K.R. the important government benefit of the special education and related services which are appropriate for her unless she leaves the private school and attends public school is a burden on the free exercise of your Plaintiffs' sincerely held religious convictions and beliefs which is protected by the free exercise clause of the First Amendment of the Constitution of the United States....."(Ct. of Appeals Rec. p.8)

Petitioners in their Brief in Support of Complaint, at pages 15 through 21, before the District Court discuss the issue of K.R.'s First Amendment rights. (Ct. of Appeals Rec. pp.59-65) In specific, on page 17 of its brief in the District Court, Petitioners state:

> "The Supreme Court clearly states that IDEA provides a benefit to the child, not the school, and that IDEA benefits are to be distributed neutrally without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends." (Ct. of Appeals Rec. p.61)

The District Court acknowledges in its opinion:

> "Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an

> instructional assistant imposes a substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion..." (Dist. Ct. Op. pp.A 20-A 21)

In reaching its decision, the District Court states:

> "Because plaintiffs are entitled to relief under the IDEA, this Court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would independently require the same result." (Dist. Ct. Op. p. 41)

Petitioners also raised the issue in the remand to the Seventh Circuit. Petitioners submit that, based on the above, it is clear that the First Amendment rights of K.R., including the neutrality principle, have been previously raised, and are still a significant issue in this case. Petitioners believe that the objection is not well founded and should be denied.

III. Respondents, at page 14 of their Brief in Opposition, raise the proposed regulation 34 C.F.R. §300.457(a) to indicate that private school children will no longer have due process rights under IDEA. This is not a relevant point with this case, as the regulations are not final. Further, the regulations could not be made retroactive, as the 1997 Amendments to IDEA are not retroactive. The Seventh Circuit had reach this decision in Doe by Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273, 1283 (7th Cir 1997). This also raises a question of whether the 1997 Amendments give statutory authority for this

regulation. In Fowler, at 1438, footnote 6, the Court questions whether the denial of due process procedures is consistent with the IDEA and its Amendments.

Petitioners believe that the objection is not well founded and should be denied.

For the foregoing reasons, the Petitioners respectfully request that their Petition of Writ of Certiorari be granted.

Respectfully submitted,

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